

## CAN LOUIS VUITTON DANCE WITH HIPHONE? RETHINKING THE IDEA OF SOCIAL JUSTICE IN INTELLECTUAL PROPERTY LAW

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*This Article reconsiders the relationship between social justice and intellectual property through the lens of two conflicting cultural phenomena in China. The first cultural phenomenon, called shanzhai, legitimizes the production of inexpensive and trendy products like the HiPhone. The second phenomenon is the rise of China as the largest luxury market in the world, unleashing an unprecedented increase in the consumer demand for luxury brands such as Louis Vuitton. The shanzhai phenomenon clashes with the IP protection that forms the foundation of the successful luxury market in China.*

*By exploring the conflict between these two cultural phenomena, this Article puts forward a new theory of social justice and intellectual property. This theory calls for intellectual property law to be redesigned to support the redistribution of three kinds of resources: benefits from technological development, cultural power, and sources of innovation. The focus on these three redistributive mandates functions to reorient the recent heated debate on social justice and intellectual property toward an inquiry about the redistribution of resources in intellectual property law.*

*The Article further considers the substantive and symbolic values of the theory in promoting social justice through intellectual property law. With respect to its substantive value, it shows that this theory has the potential to overcome the limitations of John Rawls's Difference Principle in dealing with redistributive justice issues within the ambit of intellectual property law. Moreover, this theory is valuable because it sets workable goals for mobilizing social movements to achieve cumulative eradication of injustice through intellectual property law*

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## INTRODUCTION

*Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.*

John Rawls<sup>1</sup>

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<sup>1</sup> JOHN RAWLS, A THEORY OF JUSTICE 3 (1999).

*If we do not take into account the distributive effects of intellectual property law and practices . . . the question is this: Do we control our institutions and inventions or do they, like Frankenstein's monster, control us?*

Keith Aoki<sup>2</sup>

Powered by breakthroughs in scientific research, intellectual property (IP) has played a critical role in the economic and cultural development of modern society. IP law itself, however, has progressed without due attention to its effects on social justice, where reducing inequality is seen as essential for humanity and civilization. Instead, IP law has long been shaped by the perceived need to promote efficiency and protect individual interests in personhood and human labor.<sup>3</sup>

Social justice as a human value became significant in IP law when it was discovered that IP protection causes serious inequality problems. IP restrictions can kill people. For example, people who are HIV-positive in Africa may not have the means to afford patent-protected HIV treatment drugs that could sustain their survival.<sup>4</sup> IP can also constrain an individual's ability to express her views in the public sphere because what people want to communicate, such as a passage from a copyrighted work or a trademarked logo, is often subject to proprietary control by an IP owner. Even though the fair use doctrine mitigates the speech-censoring function of copyright protection, this capability has been significantly diminished with the vast expansion of copyright protection over the past few decades.<sup>5</sup> Against the backdrop of "a global crisis in the governance of knowledge, technology and culture[.]"<sup>6</sup> there has emerged an urgent call for reshaping IP law in favor of the "[l]ong-neglected concerns of the poor, the sick, the visually impaired and others[.]"<sup>7</sup>

This Article seeks to rethink the relationship between social justice and IP by exploring two conflicting cultural phenomena in China. The first phenomenon, called *shanzhai*, legitimizes the provision of inexpensive and trendy products such as the HiPhone, which looks similar to an iPhone, offers similar functions, and uses the advertising slogan "not iPhone, better than iPhone."<sup>8</sup>

<sup>2</sup> KEITH AOKI, SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY 128 (2008).

<sup>3</sup> See, e.g., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 173 (Stephen R. Munzer ed., 2001) (stating that there are "four perspectives that currently dominate theoretical writing about intellectual property: Utilitarianism; Labor Theory; Personality Theory; and Social Planning Theory," but pointing out that "[a]s yet, however, [Social Planning Theory] is less well established and recognized than the other three").

<sup>4</sup> See, e.g., *The Doha Declaration on the TRIPS Agreement and Public Health*, WORLD HEALTH ORG., [http://www.who.int/medicines/areas/policy/doha\\_declaration/en/index.html](http://www.who.int/medicines/areas/policy/doha_declaration/en/index.html) (last visited Feb. 25, 2012) (emphasizing the fact that "concerns had been growing that patent rules might restrict access to affordable medicines for populations in developing countries in their efforts to control diseases of public health importance, including HIV, tuberculosis and malaria"); Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT'L L. 123 (2004) (arguing that the TRIPS Agreement should be interpreted to allow WTO members the maximum flexibility to increase access to essential medicines).

<sup>5</sup> See, e.g., Haochen Sun, *Fair Use as a Collective User Right*, 90 N.C. L. REV. 12, 159-63 (2011) (discussing the underutilization of the fair use doctrine and its impact on protecting public interests in copyright law).

<sup>6</sup> GENEVA DECLARATION ON THE FUTURE OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION 1 (2005), available at <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Top 10 Shanzhai Phenomena in 2009*, CHINA DAILY (Jan. 11, 2010), [www.chinadaily.com.cn/china/](http://www.chinadaily.com.cn/china/)

In June 2010, *Time* published an online list of the top ten *shanzhai* products in China.<sup>9</sup> They included the HiPhone, APhone A6, iPed, and “China’s White Houses.”<sup>10</sup> Even President Barack Obama is a victim of the *shanzhai* phenomenon; his image was used in an advertisement for the BlackBerry, a *shanzhai* cellular phone brand, implying he had endorsed the product.<sup>11</sup> Many believe that *shanzhai* products are synonymous with IP piracy and counterfeiting. However, the law is still vague and few *shanzhai* producers have been penalized under IP law.<sup>12</sup> Moreover, Western media such as *The Wall Street Journal*, *The New Yorker*, and *The New York Times* have largely portrayed the *shanzhai* phenomenon as a form of rebellion against the mainstream culture promoted for decades by the Chinese Communist Party.<sup>13</sup> A recent *Harvard Law Review* article even discussed a legal case where the defendant attempted to use *shanzhai* as a defense against an allegation of IP infringement.<sup>14</sup>

Growing rapidly and in parallel to the *shanzhai* phenomenon is wealthy Chinese people’s vastly increased demand for a wide variety of luxury products. Fueled by it, China has become the world’s largest luxury market.<sup>15</sup> This contrasts sharply with the *shanzhai* trend because luxury brands require strong IP protection in order to ensure the success of the products and brand growth.

This Article argues that a closer look at these two cultural phenomena sheds new light on the relationship between social justice and IP law. The contrast between the two highlights issues of wealth distribution, cultural power, and resources for innovation in the context of IP law. The *shanzhai* phenomenon operates on behalf of hundreds of millions of the poor and culturally or politically marginalized in China to promote social justice, all while potentially violating IP laws. In contrast, the luxury market phenomenon is driven by the need to protect the interests of the rich and those currently in possession of cultural and political power. To this end, IP is used as a legal tool to protect ownership rights in the luxury market. While the *shanzhai* phenomenon represents

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09tentopnews/2010-01/11/content\_9301764.htm.

<sup>9</sup> Justin Bergman, *Top 10 Chinese Knockoffs*, TIME (June 22, 2010), <http://www.time.com/time/specials/packages/completelist/0,29569,1998580,00.html>.

<sup>10</sup> *Id.* China’s White Houses refer to the “[f]ull-scale replicas of the U.S. Capitol building [that] have been constructed in recent years . . . [and the] . . . mirror image of the White House, complete with [its] own Oval Office and portrait gallery of American Presidents, as well as miniature version of the Washington Monument and Mount Rushmore.” *Id.* at slide 6.

<sup>11</sup> Jason Dean & Ellen Zhu, *Postcard From Shanzhailand: ‘Obama’ Endorses Chinese ‘BlackBerry’*, WALL ST. J. (June 23, 2009), <http://blogs.wsj.com/chinarealtime/2009/06/23/postcard-from-shanzhailand-obama-endorses-chinese-blackberry>.

<sup>12</sup> See *infra* Part II.B.2.

<sup>13</sup> See, e.g., David Barboza, *Where False Rings True*, N.Y. TIMES, Apr. 28, 2009, at B1; Sky Canaves & Juliet Ye, *Imitation Is the Sincerest Form of Rebellion in China*, WALL ST. J., Jan. 22, 2009, at A1; Evan Osnos, *Letter From China: A Chinese Pirate Unmasks*, NEW YORKER, Mar. 5, 2009, <http://www.newyorker.com/online/blogs/evanosnos/2009/03/a-chinese-pirat.html>.

<sup>14</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 853-54 (2010) (“In *Schiefflin & Co. v. Jack Co. of Boca* . . . the defendant John Calderaio developed ‘Dom Poppingnon’ bottled popcorn . . . [and though he] stated that he conceived Dom Poppingnon popcorn ‘for the purpose of casting ridicule upon the tastes and pretensions of Dom Pérignon purchasers,’ this *shanzhai* defense was unsuccessful.” (quoting *Schiefflin & Co. v. Jack Co. of Boca*, 850 F. Supp. 232, 236-37 (S.D.N.Y. 1994))).

<sup>15</sup> *China to Pass Japan as Top Luxury Market in 2012*, CHINA DAILY (June 10, 2011), [http://www.china-daily.com.cn/bizchina/2011-06/10/content\\_12670694.htm](http://www.china-daily.com.cn/bizchina/2011-06/10/content_12670694.htm).

the quest for an anarchic world without IP,<sup>16</sup> the luxury market represents an area of business that requires strong IP protection.<sup>17</sup> The contrast between these two phenomena provides a vantage point to look at the relationship between social justice and IP. Underneath this contrast lies a question of tremendous practical and theoretical significance: how should we use the idea of social justice to address the conflict between the *shanzhai* phenomenon and the luxury market phenomenon, and its relationship with IP law?

By examining this question in detail, this Article puts forward a new theory of social justice and IP law. It discusses how and why this new theory should focus on three main redistributions in IP law: the distribution of benefits resulting from technological development, the distribution of cultural power, and the distribution of sources of innovation. Moreover, this Article explores these three forms of redistribution in order to consider the legal, political, and cultural implications of the rise of the *shanzhai* and luxury market phenomena in China. Based on this new theory of social justice, this Article argues that while the protected luxury market is threatened by the *shanzhai* phenomenon, IP law should not be used as a tool to suppress *shanzhai* as a whole. Instead, social justice should be infused into IP law, and a purely luxury market-oriented IP regime should be avoided.

In addition to providing a systematic response to the conflict between the two cultural phenomena in China, this Article offers two more contributions to the ongoing debate about IP and social justice that has concerned legal scholars, policymakers, and civil activists. First, it provides a systematic answer about what should be redistributed in the area of IP law in order to achieve social justice. In the past, this issue has not been adequately addressed by scholars who have invoked John Rawls's Difference Principle to study the interactions between social justice and IP law.<sup>18</sup> According to the Rawlsian Difference Principle, "the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society."<sup>19</sup> Following this principle, scholars have argued that resources under IP protection should be distributed in favor of the least advantaged people, such as those who have limited or no access to HIV-treatment drugs<sup>20</sup> or

<sup>16</sup> See, e.g., Xi Wen, *The Recurring Shanzhai: A Phenomenon*, CHINA TODAY (Dec. 2010), [www.china.com.cn/ctenglish/se/txt/2009-03/12/content\\_184541.htm](http://www.china.com.cn/ctenglish/se/txt/2009-03/12/content_184541.htm) ("[S]hanzhai has had multiple meanings: escape from authority; rising against social injustice; developing a set of rules parallel to those of the government; or submitting to a government amnesty and returning to the established order.").

<sup>17</sup> See Adam Smith, *China - Chinese Sham Glam: Innocuous Innovation or Mark-Owner Menace?*, WORLD TRADEMARK REV. (Feb. 24, 2009), <http://www.worldtrademarkreview.com/daily/detail.aspx?g=af36089a-9df6-4c13-907e-52ce9bbd60a> (quoting Lucy Nichols, who explains that *shanzhai* are "bizarre parody products" and George Chan, who explains that "[s]hanzhai is diametrically opposed to fashion and brands . . . [i]t is about people turning their noses up to the government and IP owners." Nichols also referenced the saying, "where there is *baoli* (outlandish, dishonest profit) there is *shanzhai*.").

<sup>18</sup> See *infra* notes 20-22.

<sup>19</sup> RAWLS, *supra* note 1, at 65. Rawls further explained that "the intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of these less fortunate." *Id.*

<sup>20</sup> See, e.g., William W. Fisher & Talha Syed, *Global Justice in Health Care: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581, 627-29 (2007) (discussing the possibility of applying the Rawlsian Difference Principle as the moral basis to address the tension between patent protection of HIV-related drugs and the need to treat AIDS and other diseases in the developing world); Peter Lee, *Toward a Distributive Commons in Patent Law*, 2009 WIS. L. REV. 917, 949 (2009) (citing the Rawlsian Difference Principle to argue that to enhance access to patented health technologies for low-income communities "may in some instances require targeted efforts to reach the poorest

textbooks.<sup>21</sup> A recently published book on intellectual property even hails the Rawlsian Difference Principle as a fundamental standard for evaluating social justice accommodations in the IP system.<sup>22</sup>

However, the Rawlsian Difference Principle provides little guidance as to *what* should be subject to pro-justice distribution in the IP system. When applying this principle, many IP scholars seem unaware that it sheds no light on two central issues: first, *what* should be distributed or redistributed and second, *who* should be the beneficiaries of these pro-justice distributions in the IP system.

This Article addresses these two problems by identifying three kinds of resources that need to be redistributed in the area of IP law: benefits from technological developments, cultural power, and sources of innovation. These three redistributive justice mandates have significant practical ramifications on law and policy. Ex ante, they can help legislators and policymakers decide on the distributive goals of IP laws when they allocate entitlements to intangible resources. Ex post, they can assist judges examining the validity of IP laws.

Additionally, this Article establishes workable goals for social movements that aim to eradicate injustice in IP law and provides a method of mobilizing these movements. Legal instruments, such as human rights treaties, have recognized the redistributive needs relevant to IP law for nearly sixty years. For example, the human right to enjoy the benefits of scientific progress is enshrined in both the Universal Declaration of Human Rights<sup>23</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>24</sup> However, there has been little progress in realizing this human right. The gap between the rich and the poor in terms of access to the benefits from technological developments has even widened since the adoption of these two treaties.<sup>25</sup> Moreover, though the World Intellectual Property Organization launched its

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members of society"); John Linarelli, *What Do We Owe Each Other in the Global Economic Order?: Constructivist and Contractualist Accounts*, 15 J. TRANSNAT'L L. & POL'Y 181, 215 (2006) ("The current regime of global intellectual property rights also seems to violate the Rawlsian difference principle . . . . The current global intellectual property system, with patent protecting prices, makes the worst off groups . . . even worse off while benefiting better off groups such as pharmaceutical firms in high-income countries."); Nevin M. Gewertz & Rivka Amado, *Intellectual Property and the Pharmaceutical Industry: A Moral Crossroads between Health and Property*, 55 J. BUS. ETHICS 295, 303 (2004) ("The redistribution of [the anti-HIV medication] itself to treat AIDS patients or the redistribution of the royalties acquired from [the medication] to subsidize poorer patients, both create more equal distributions of basic liberties and benefits the least advantaged.").

<sup>21</sup> See Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 805 (2007) (arguing that intellectual property law should not forestall the widespread dissemination of textbooks, even where those seeking education lack the means to compensate the copyright owner).

<sup>22</sup> ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 117 (2011) (stating that "the inequality created by the IP system is a justifiable form of inequality when viewed from the perspective of society's most disadvantaged citizens").

<sup>23</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 71 (Dec. 10, 1948) [hereinafter UDHR].

<sup>24</sup> International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>25</sup> See Audrey R. Chapman, *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, J. HUM. RTS., 2009, at 9 (asserting that, in order for these international declarations to be realized, "science and technology...need to be broadly disseminated."); LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 233-42 (2011).

Developmental Agenda in 2007,<sup>26</sup> “there is not much agreement yet about what such a broad agenda for intellectual property and development would require.”<sup>27</sup>

This Article shows that the *shanzhai* phenomenon in China provides lessons that can be used in redistributing IP resources for social justice purposes on a larger scale. The three resources that the *shanzhai* phenomenon has sought to redistribute help create a set of clear goals for promoting social justice in IP law. This phenomenon also embodies a progressive agenda on how to address redistributive needs when IP protection and social justice collide.<sup>28</sup>

Moreover, the Article explores the means by which the *shanzhai* phenomenon has endeavored to meet redistributive needs in China. In particular, it considers the reasons why the *shanzhai* phenomenon has thrived and progressed in such a hostile political environment where speech surveillance and censorship are ruthless and pervasive.<sup>29</sup> *Shanzhai* includes violating laws, taking advantage of gray areas of the law, and capitalizing on permissible uses of IP assets. A comprehensive use of new social media has profoundly facilitated the redistributive agenda of the *shanzhai* phenomenon.<sup>30</sup>

This Article is divided into four parts. Part I discusses the legal, economic, and social factors that fostered the rise of both the *shanzhai* phenomenon and the luxury market in China; in particular, it explains why these two phenomena have gained simultaneous and widespread popularity. Part II considers the extent to which the *shanzhai* phenomenon challenges the IP protection that forms the foundation of the success of the luxury market in China. Part III then examines the nature of the resources that the *shanzhai* phenomenon has sought to redistribute, and its effect on IP law. This supports the argument that social justice should focus on redistributing three kinds of resources: benefits from technological developments, cultural power, and sources of innovation. Part IV explores the lessons we can learn from the realization of these three redistributive justice mandates within the *shanzhai* phenomenon. It also considers the larger implications of the *shanzhai* phenomenon, capitalizing on IP law as a legal tool to promote social justice.

## I. THE SHANZHAI PHENOMENON AND CHINA AS THE LARGEST LUXURY MARKET

### A. *The Rise of the Shanzhai Phenomenon*

China has witnessed the rise of the *shanzhai* phenomenon over the past few years. *Shanzhai* is a Chinese term with no direct English translation. It literally means “mountain

<sup>26</sup> WIPO Development Agenda, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Oct. 2007), <http://www.wipo.int/ip-development/en/agenda/>.

<sup>27</sup> Madhavi Sunder, IP<sup>3</sup>, 59 STAN. L. REV. 257, 310 (2006).

<sup>28</sup> See generally AMARTYA SEN, THE IDEA OF JUSTICE ix (2009) (discussing a theory of justice that seeks to “clarify how we can proceed to address questions of enhancing justice and removing injustice, rather than to offer resolutions of questions about the nature of perfect justice”).

<sup>29</sup> See, e.g., Sharon LaFraniere & David Barboza, *China Tightens Censorship of Electronic Communications*, N.Y. TIMES, Mar. 22, 2011, at A4 (“[T]he Chinese government has tightened its grip on electronic communications since protests began engulfing the Arab world.”).

<sup>30</sup> See, e.g., Stephanie Hemelryk Donald, *Introduction: Why Mobility Matters: Young People and Media Competency in the Asia-Pacific*, in YOUTH, SOCIETY AND MOBILE MEDIA IN ASIA 1 (Stephanie Hemelryk Donald et al. eds., 2010).

village” or “mountain stronghold,” referring to the mountain stockades of warlords or thieves far from governmental control.<sup>31</sup>

In general, *shanzhai* refers to, among other things, “Chinese imitation and pirated brands and goods, particularly electronics,” and “people who are look-alikes, low-quality or improved goods, as well as things done in parody.”<sup>32</sup> *Shanzhai* is a relatively new, but extremely popular cultural phenomenon in China. The trend has attracted hundreds of millions of followers, who closely follow the relentless waves of new *shanzhai* products and events.<sup>33</sup> *Shanzhai* has also been covered extensively in the Western media,<sup>34</sup> and the Stanford Graduate School of Business prepared a case study on the economic structure of the *shanzhai* phenomenon in the mobile phone market (hereinafter Stanford case study).<sup>35</sup> The *shanzhai* phenomenon can be subdivided into two sectors: the *shanzhai* manufacturing industry and *shanzhai* cultural activities. While the term *shanzhai* was first used to label manufactured products like cellular phones, it gradually spread to include imitation cultural activities such as the *Shanzhai* Olympic Torch Relay and the *Shanzhai* Nobel Prize.<sup>36</sup>

### 1. *Shanzhai* Manufacturing Industry

*Shanzhai* manufacturing began with mobile phones. *Shanzhai* mobile phone factories are predominantly located in Shenzhen, a city across the border from Hong Kong.<sup>37</sup> There are hundreds of mobile phone factories, many of which opened in the early 2000s.<sup>38</sup> Some of these factories use NCKIA and SCNY as the brand names of their products.<sup>39</sup> Apple’s iPhone is one of the most frequently imitated products; at least six *shanzhai* versions have appeared in the market in China, including the HiPhone,<sup>40</sup> Mini iPhone,<sup>41</sup> and iPhone Air.<sup>42</sup> Ironically, some of these

<sup>31</sup> *Shanzhai*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Shanzhai> (last visited Feb. 6, 2012); see also WILLIAM T. ROWE, CRIMSON RAIN: SEVEN CENTURIES OF VIOLENCE IN A CHINESE COUNTY (2006) (discussing *shanzhai* from a historical perspective).

<sup>32</sup> *Shanzhai*, *supra* note 31. Despite having many references, *shanzhai* has no precise definition that can encapsulate all of its dynamic elements. This is because the phenomenon itself has developed very rapidly over the years with the mushrooming of new products and events, all labeled as *shanzhai*.

<sup>33</sup> See, e.g., Hao Nan, “HiPhone” Now a Hot Commodity on Taobao, CHINA DAILY (Aug. 17, 2011), [www.chinadaily.com.cn/usa/business/2011-08/17/content\\_13134923.htm](http://www.chinadaily.com.cn/usa/business/2011-08/17/content_13134923.htm) (reporting that the HiPhone “is sold by more than 1,300 online stores, with the best-performing shop shipping more than 1,200 phones in 30 days”).

<sup>34</sup> See, e.g., articles cited *supra* note 14.

<sup>35</sup> HAU LEE ET AL., SHANZHAI (“BANDIT”) MOBILE PHONE COMPANIES: THE GUERRILLA WARFARE OF PRODUCT DEVELOPMENT AND SUPPLY CHAIN MANAGEMENT 1 (2010).

<sup>36</sup> *Shanzhai*, *supra* note 31.

<sup>37</sup> Lee et al., *supra* note 35, at 4.

<sup>38</sup> *Shanzhai*, *supra* note 31.

<sup>39</sup> Bai Gao, *The Informal Economy in the Era of Information Revolution and Globalization: The Shanzhai Cell Phone Industry in China*, 31(2) CHINESE J. SOC. 1, 8 (2011) (“Some copycats attempt to go around the law by altering the trademark. For example, they changed Nokia to Nckia, Sony to Scny, and iPhone to HiPhone.”).

<sup>40</sup> See Bergman, *supra* note 9, at slide 1.

<sup>41</sup> Jason Wang, *Mini iPhone KA08, Quad Band Dual Card Dual Standby GSM Bluetooth* (Jan. 31, 2009), <http://www.zimbio.com/cell+phone+hacks/articles/263/Mini+iPhone+KA08+Quad+Band+Dual+Card+Dual>.

<sup>42</sup> *Apple iPhone Air Will Not Make It To MacWorld* (Jan. 4, 2009, 21:33 PDT), <http://www.ubergizmo.com/2009/01/apple-iphone-air-will-not-make-it-to-macworld/>.



*shanzhai* imitations are reported to possess features superior to the iPhone, including a slimmer appearance, a greater variety of functions, and increased system stability.<sup>43</sup> With trendy designs and lower prices, *shanzhai* products are popular in both local and overseas markets, including India, Africa, and the Middle East.<sup>44</sup>

In general, *shanzhai* producers routinely imitate the looks of branded products. Their products bear strong resemblance to the products of popular brands in well-established markets. Consumers might not be misled to believe that these *shanzhai* products are made by manufacturers of brand name products, but they can figure out that they have features that resemble those of the branded products.

*Shanzhai* companies are not only highly responsive to market trends, but also operate with low cost, efficient production systems and no design teams.<sup>45</sup> A famous example is the “Mi-Obama” cell phone that contained Obama’s slogan “Yes We Can” on the back of the case, which reportedly sold well in Kenya during the 2008 U.S. presidential election.<sup>46</sup> With such manufacturing advantages, the *shanzhai* cell phone industry has achieved great market success. The Stanford case study reports the scale of this industry and its domestic and global impacts:

A study by Springboard Research estimated that there were about 140 million [s]hanzhai mobile phones produced in China in 2009, of which about 100 million were exported. About 60 percent of these were shipped to countries in the Asia-Pacific region, representing about 30 percent of mobile phone sales in these countries. Shanzhai mobile phones were popular in developing countries such as Russia, India, Bangladesh, Pakistan, and in the Middle East and Africa.<sup>47</sup>

## 2. *Shanzhai* Cultural Activities

Along with the flood of *shanzhai* products in China, people also use *shanzhai* to refer to certain types of cultural activities that have become very popular.<sup>48</sup> These activities are prominently featured on the Internet as well as on traditional media outlets. They are considered new and cool because they embody powerful resistance to and rebellion against a traditional Chinese culture that discourages people from openly expressing their individual viewpoints to the public at large. *Shanzhai* cultural activities also rebel against the ideology and propaganda that demand people’s unconditional submission to the rule of the Communist Party in China. In general, these *shanzhai* activities fall into two categories: parody and deconstruction.

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<sup>43</sup> Lee et al., *supra* note 35, at 12.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2, 5-6.

<sup>46</sup> See Shan Zhai Ban Shou Ji Qiang Feng Tou, Ou Ba Ma Cheng Shou Ji Ming Pai [Shan Zhai Cell Phones Come into Spotlight; Obama Becomes a Cell Phone Brand], NOWNEWS (Jan. 20, 2009), [www.nownews.com/2009/01/20/339-2397954.htm](http://www.nownews.com/2009/01/20/339-2397954.htm).

<sup>47</sup> Lee et al., *supra* note 35, at 12. See also Wang Xing, ‘Shanzhai’ Culture Now in Crosshairs, CHINA DAILY, (May 18, 2009, 8:06 AM), [http://www.chinadaily.com.cn/bw/2009-05/18/content\\_7785393.htm](http://www.chinadaily.com.cn/bw/2009-05/18/content_7785393.htm) (“Shanzhai mobile phones make up about 30 percent of China’s handsets market. In the emerging netbook market, Shanzhai products also take up about eight percent worldwide, according to DRAmEXchange Technology Inc., a Taiwanese market watcher.”).

<sup>48</sup> *Shanzhai*, *supra* note 31.

### Parody

Grass-roots communities have taken advantage of *shanzhai* cultural activities to make fun of authoritative cultural events such as the Chinese National Spring Gala, the Chinese National Television Lecture Room Series, and the Beijing Olympic Torch Relay.<sup>49</sup> These activities are called *shanzhai* because they involve people at the grass-roots level creating programs that imitate authoritative events organized by high-profile media companies or the Chinese government.<sup>50</sup> Recordings of these cultural activities are disseminated over the Internet, where viewers write online comments to emphasize their parodic elements.<sup>51</sup> In addition, *shanzhai* movies parodying high-end blockbusters have become popular in China.<sup>52</sup>

### Deconstruction

Another trend includes a multitude of *shanzhai* cultural activities aimed at deconstructing the personas of celebrities. Examples of this phenomenon include companies that pay celebrity look-alikes for product endorsements. In 2008, a technology institute in China produced a TV advertisement that featured a man who looked like Jay Chou, a Taiwanese celebrity who is extremely popular in China. This man was later called “*Shanzhai Jay Chou*” and the institute reportedly received about 1,000 more applications than the previous year as a result of the advertisement.<sup>53</sup> Surprisingly, even President Barack Obama has fallen victim to *shanzhai* cultural activities. His image, as shown below,<sup>54</sup> was used in an advertisement for BlackBerry, a *shanzhai* cell phone, suggesting his endorsement of the product. Although customers are not likely to believe that this is a true endorsement, fusing President Obama with a *shanzhai* cell phone product is likely to negatively impact his reputation.

Some low-end performing agencies were reported to have hired people who look like popular Chinese celebrities to perform in rural China.<sup>55</sup> The performances and the celebrity look-alikes are referred to as *shanzhai*.<sup>56</sup> Although these performances often make fun of the

<sup>49</sup> *Id.*

<sup>50</sup> See Canaves & Ye, *supra* note 13 (reporting that Shanzhai culture is perceived as a movement “from the grass roots and for the grass roots ... and as a means of self-expression ... [to] “giv[e] people another choice and the possibility of resisting dominant cultural values”).

<sup>51</sup> See Philipp Boeing, *Shanzhai – Dimensions of a Chinese Phenomenon*, CHINA BUSINESS AND RESEARCH, 2009, at 1, available at [http://www.frankfurt-school.de/content/en/ecbc/ecbc\\_portal/content\\_files/file2/CBR2009\\_001\\_Boeing\\_shanzhai.pdf](http://www.frankfurt-school.de/content/en/ecbc/ecbc_portal/content_files/file2/CBR2009_001_Boeing_shanzhai.pdf) (pointing out that “[i]n recent years Shanzhai culture spread particularly via the internet.”).

<sup>52</sup> See *Shanzhai*, *supra* note 31 (“These movies usually have low budgets, yet achieve commercial success by parodying, making fun of or borrowing elements from high-end Hollywood blockbuster movies. One of the first shanzhai movies is Ning Hao’s ‘Crazy Stone.’ It imitates the multi-angle shooting, rapid cutting and stunts that are usually used in Hollywood action movies, yet it retains the grass-roots Chinese set up. With a 3 million Hongkong [sic] dollar budget, ‘Crazy Stone’ achieved 22 million-box-office revenue. Following its success, shanzhai movies like ‘the Big Movie’ series and ‘No.2 in the World’ were made. Some also argue that Hollywood parody movies like ‘Scary Movie’ are the true inspirational force behind shanzhai movies.”).

<sup>53</sup> See *Shan Zhai Jay Chou Zhou Hong [Shan Zhai Jay Chou Sought After]*, SOUTHERN METRO ENTERTAINMENT WEEKLY (Jan. 7, 2009), <http://www.nbweekly.com/magazine/cont.aspx?artiID=7753>.

<sup>54</sup> Dean & Zhu, *supra* note 11.

<sup>55</sup> See *Shanzhai*, *supra* note 31.

<sup>56</sup> *Id.*

celebrities, these activities were primarily designed to cater to those who live in rural China and could not afford to attend the performances of actual celebrities.<sup>57</sup>

*Shanzhai* cultural activities have also sought to deconstruct the business images or strategies of high-profile companies. For example, Hong Kong MTR Corporation Limited, a private company that operates the subway system in Hong Kong, launched a news conference to showcase its new application for iPhone users and hired a Chinese actor who looked and behaved like Steve Jobs.<sup>58</sup> This news conference was widely recognized as a *shanzhai* activity because it imitated the way that Apple Inc. has showcased its new products.<sup>59</sup>



#### B. China as the Largest Luxury Market

The past few years have also witnessed an incredible growth in demand for luxury products in China.<sup>60</sup> Despite the turbulence of the recent financial crisis, China's luxury goods market has steadily grown.<sup>61</sup> In particular, luxury brands with European origins are extremely popular in China, with products ranging from fashion apparel and accessories, to footwear, perfume, cosmetics, jewelry, automobiles, and liquor.<sup>62</sup> According to the World Luxury Association, the total sales volume of luxury products in China was \$9.4 billion by the end of December 2009.<sup>63</sup> That accounted for 27.5% of the world's total luxury sales volume, making China the second largest market for luxury products in the world.<sup>64</sup> Consulting firm Bain and Company found that mainland Chinese purchases of luxury goods in 2010 increased 23% compared to 2009.<sup>65</sup> Boston Consulting Group has predicted that China will consume about 29% of the world's total luxury goods in 2015, surpassing Japan as the world's top luxury market.<sup>66</sup>

<sup>57</sup> *Id.*

<sup>58</sup> Richard Lai, *Shanzhai Steve Jobs Makes a Special Appearance in Hong Kong* (Oct. 13, 2010, 9:01 PM), <http://www.engadget.com/2010/10/13/shanzhai-steve-jobs-makes-a-special-appearance-in-hong-kong-vid/>.

<sup>59</sup> *Id.*

<sup>60</sup> See *New Chinese Nobility Crazy for Luxury Goods*, GLOBAL TIMES (Mar. 2, 2010, 5:06 PM), <http://business.globaltimes.cn/industries/2011-04/509126.html>.

<sup>61</sup> *Id.*

<sup>62</sup> KPMG, CHINA'S LUXURY CONSUMERS: MOVING UP THE CURVE 18 (2008), available at [http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/luxury\\_consumers\\_0804.pdf](http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/luxury_consumers_0804.pdf).

<sup>63</sup> *New Chinese Nobility Crazy for Luxury Goods*, *supra* note 60.

<sup>64</sup> *Id.*

<sup>65</sup> See, *Luxury a Magnet for China Sales*, HONG KONG TRADE DEV. COUNCIL (Feb. 18, 2011), available at <http://www.hktdc.com/info/mi/a/imm/en/1X07BP3U/1/International-Market-News/Luxury-a-magnet-for-China-sales.htm>.

<sup>66</sup> Bao Chang, *Luxury Goods Demand May Peak by 2015*, CHINA DAILY (Jan. 22, 2010), [http://www.chinadaily.com.cn/business/2010-01/22/content\\_9360040.htm](http://www.chinadaily.com.cn/business/2010-01/22/content_9360040.htm); PIERRE XIAO LU, ELITE CHINA: LUXURY

Meanwhile, it has already been reported that “China has become the country with the strongest purchasing power of luxury cars in the world.”<sup>67</sup> Simply put, wealthy Chinese consumers are now considered to be the miracle boosters for the global luxury market, which suffered heavily during the recent financial crisis.<sup>68</sup>

In responding to this huge business potential, luxury companies have marketed aggressively in China. For example, brands like Dunhill, Hugo Boss, and Burberry have opened ninety-three, eighty-nine, and fifty stores, respectively, in China.<sup>69</sup> Moreover, international luxury retailers are now attempting to adjust their sales strategy to suit the Chinese market by ensuring that the goods are the same as the newest models offered in Europe,<sup>70</sup> or that they are unique to the Chinese market. For example, Hermès marketed 100 limited edition red mini-Birkinbags designed specifically for Chinese women going to parties and receptions.<sup>71</sup>

Louis Vuitton illustrates how luxury brands have rapidly expanded their business in China. In 2010, Bain & Company found that 46% of survey respondents named Louis Vuitton as the most desired brand in China, ranking it ahead of Chanel, Gucci, and Armani.<sup>72</sup> The reasons for the French brand’s popularity include its early establishment in the Chinese market through the opening of storefronts, its strict quality control over products, and its engagement with Chinese consumers through online marketing.<sup>73</sup> While Bernard Arnault, chairman of the parent company LVMH Moët Hennessy Louis Vuitton SA, acknowledged there are “a lot of problems” with piracy in China, the brand is continuing to expand in the mainland in order to ride the tide of growing consumer interest in luxury goods.<sup>74</sup>

The luxury market in China has not flourished in a vacuum. Rather, there are profound economic, social, and cultural forces behind the rapidly growing luxury market. First, the economic reform undertaken by the Chinese government has led to rapid economic growth. According to the Boston Consulting Group, “China’s wealth increased by about 28 percent to \$5.4 trillion. It was one of the highest growth rates in the world [between 2004 to 2009]. . . . It was the third largest population of millionaires, behind the United States and Japan.”<sup>75</sup>

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CONSUMER BEHAVIOR IN CHINA (2008).

<sup>67</sup> *China’s Luxury Market Exceeds America*, PEOPLE’S DAY (Sept. 21, 2009, 9:41 AM), <http://www.free-republic.com/focus/f-chat/2344502/posts>.

<sup>68</sup> *China’s Luxury Consumers*, *supra* note 62, at 30.

<sup>69</sup> See *China Luxury Market 2010: The Omnipresence of Global Brands*, RED LUXURY (Dec. 30, 2011), <http://red-luxury.com/2010/12/30/china-luxury-market-2010-the-omnipresence-of-global-brands/>.

<sup>70</sup> See *Luxury a Magnet for China Sales*, *supra* note 65.

<sup>71</sup> *Id.*

<sup>72</sup> See BAIN & COMPANY, CHINA LUXURY MARKET STUDY 2010 7 (Nov. 2010), available at [http://www.bain.com/bainweb/PDFs/cms/Public/China\\_Luxury\\_Market\\_Study\\_2010.pdf](http://www.bain.com/bainweb/PDFs/cms/Public/China_Luxury_Market_Study_2010.pdf).

<sup>73</sup> See, e.g., *Louis Vuitton’s Life of Luxury*, BLOOMBERG BUSINESSWEEK (Aug. 6, 2007), [http://www.businessweek.com/magazine/content/07\\_32/b4045419.htm](http://www.businessweek.com/magazine/content/07_32/b4045419.htm).

<sup>74</sup> *Louis Vuitton Opens Beijing Flagship Store*, CHINA DAILY (Nov. 21, 2005), available at [http://www.chinadaily.com.cn/english/livechina/2005-11/21/content\\_496633.htm](http://www.chinadaily.com.cn/english/livechina/2005-11/21/content_496633.htm).

<sup>75</sup> NELSON CHOI ET AL., BOSTON CONSULTING GROUP, WEALTH MARKETS IN CHINA: CAPTURING THE MULTIFACETED GROWTH OPPORTUNITIES 7-8 (2010), available at <http://www.bcg.com.cn/en/files/publications/>

The Boston Consulting Group's report also showed that the number of millionaire households (in terms of U.S. dollars) had risen by 60% in China in 2009 alone.<sup>76</sup> Credit Suisse predicted that China's total household wealth may more than double to \$35 trillion by 2015.<sup>77</sup> Second, a strengthening yuan (the currency of China) is boosting Chinese spending power, as imports become cheaper.<sup>78</sup> Third, although taxes are still considered high (with a 17.5% value-added tax, 10% consumption tax, and an average 24% luxury tax<sup>79</sup>), China's implementation of its WTO commitments through the steady reduction of tariffs has also contributed to the rise in luxury goods. For example, a KPMG report notes that the 28% to 40% tariff on imported watches was cut to 12.5% in 2004.<sup>80</sup>

Cultural factors such as prestige and peer pressure are also cited as contributing to the boost in luxury consumption in China. Market research shows that "Chinese consumers who buy luxury goods do so to show off or to help define their identity. The Asian concept of face—or pride and dignity—is a key reason they invest in expensive brands. In a fast-growing economy, status symbols are the easiest way to demonstrate wealth and power."<sup>81</sup> This is reinforced by the KPMG report, which found that more than 60% of Chinese respondents saw luxury brands as a way to demonstrate their status and success.<sup>82</sup> However, while Chinese consumers traditionally tended to make purchasing decisions based on visibly luxurious goods, they are now developing awareness of brand allegiance, thanks to retailers' marketing strategies and improving customer service. In addition, the KPMG report stated that over 70% of consumers bought luxury goods "as a form of self-reward" for "indulgence, relaxation and enjoyment."<sup>83</sup> According to KPMG, Chinese consumption of luxury goods is concentrated on personal accessories such as cosmetics, perfume, and watches, which can be justified as rewards.<sup>84</sup> Despite this, some analysts predict that the recent consumer demand for ostentatious luxury goods, which reflects a "nouveau riche" mentality, will gradually evolve toward demand for more sophisticated and discreet styles.<sup>85</sup>

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reports\_pdf/BCG\_Wealth\_Markets\_in\_China\_Nov\_2010\_ENG.pdf.

<sup>76</sup> *Id.*

<sup>77</sup> See Heda Bayron, *China Demand Boosts Luxury Brand Profits*, VOICE OF AMERICA (Oct. 18 2010), <http://www.voanews.com/english/news/Luxury-Brands-Profit-from-Chinese-Demand-105164384.html>.

<sup>78</sup> *Id.*

<sup>79</sup> See Laura Fitch, *By Design: Luxury Brands in China*, BRAND CHANNEL (May 18, 2009), [http://www.brandchannel.com/features\\_effect.asp?pf\\_id=478](http://www.brandchannel.com/features_effect.asp?pf_id=478).

<sup>80</sup> KPMG, LUXURY BRANDS IN CHINA 12 (2008), available at [http://www.kpmg.com.cn/en/virtual\\_library/Consumer\\_markets/CM\\_Luxury\\_brand.pdf](http://www.kpmg.com.cn/en/virtual_library/Consumer_markets/CM_Luxury_brand.pdf).

<sup>81</sup> See *China: Breaking Out the Largest Logos*, TIME, Sept. 21, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1664358,00.html>.

<sup>82</sup> *China's Luxury Consumers*, *supra* note 62, at 7.

<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 16.

<sup>85</sup> Ronald Degan, *Opportunity for Luxury Brands in China* 12, (Globadvantage Ctr. of Research in Int'l Bus. & Strategy, Working Paper No. 31, 2009), available at [http://www.globadvantage.ipleiria.pt/wp-content/uploads/2009/06/working\\_paper-31\\_globadvantage.pdf](http://www.globadvantage.ipleiria.pt/wp-content/uploads/2009/06/working_paper-31_globadvantage.pdf).

## II. THE CHALLENGES POSED BY THE SHANZHAI PHENOMENON TO IP PROTECTION

Based on the preceding examination of the two cultural phenomena in China, this Part will first discuss why IP protection is crucial for the luxury market. It will further examine the economic, social, and cultural impacts of the *shanzhai* phenomenon on IP protection of luxury products as well as the three forms of copying acts involved in the *shanzhai* phenomenon: imitative copying, dilutive copying, and creative copying. It will then discuss how and why these forms of copying have posed serious challenges to IP protection of the luxury market in China.

### A. *The Importance of IP Protection for Luxury Products*

The lifeblood of luxury products is the social distinction that is recognized by customers.<sup>86</sup> Social distinction associated with luxury goods has two forms. First, such distinction is conveyed by the economic value central to luxury products. Their high prices mean that only a very limited number of people can afford them. Luxury stores are also usually located at the hearts of business centers in major cities, and companies spend extensively to advertise their latest products and promote their images to the public. These factors all convey social exclusivity. Second, luxury products have unique cultural value. Luxury companies maintain teams of designers to lead fashion trends and enhance their prestige in the minds of the public. Their products are usually designed and marketed with distinctive cultural elements that convey symbolic meanings and leading fashion trends. Consumers are willing to spend money on luxury products that are far more expensive than ordinary products because they are attracted by the distinctive design or prestigious status of luxury products. They feel that owning a particular luxury product will provide them with the distinction and prestige associated with that product. For such consumers, a luxury brand is a symbol of affluence and taste, making them stand out from people who use ordinary goods.<sup>87</sup>

IP protection plays a pivotal role in maintaining and enhancing the social distinction of luxury products by protecting their economic and cultural values. IP law functions to ensure that brand owners can recoup their investments in the creation and dissemination of their copyrighted works, trademarked logos, or patented designs. For this purpose, IP law vests in IP holders a bundle of economic rights. IP law prohibits copying acts that infringe on the IP rights enjoyed by developers of luxury products that are usually laden with product designs or brand logos protected by IP law. In this way, IP law penalizes those who make IP-infringing copying acts, and seeks to deter those acts.

In general, the bundle of exclusive rights vested in IP holders affords two levels of protection against unauthorized copying acts: anti-confusion protection and anti-dilution protection.<sup>88</sup> The former type of protection prohibits imitative copying that would lead consumers to misconceive who is the original maker of a product. The latter prohibits dilutive copying that would blur the distinctiveness, and thus harm the reputation of luxury products.

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<sup>86</sup> See, Beebe, *supra* note 14, at 878-79 (discussing modern reliance on intellectual property law to control access to and maintain the distinctiveness of luxury goods).

<sup>87</sup> See, e.g., Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1718-19 (2006) (discussing the status-conferring nature of fashion goods).

<sup>88</sup> See generally, JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY (3d ed. 2010).

With regard to anti-confusion protection, copyright law prohibits reproduction of a work that is identical to or substantially similar to the work.<sup>89</sup> For example, in *Porsche v. Beijing Techart*, the defendant, a former authorized dealer of Porsche cars, was found to have infringed Porsche's copyright in its architectural design of its sales center in Beijing by constructing a building that bore many of the features of Porsche's architectural design.<sup>90</sup> Similarly, design law also prohibits use of designs that are substantially similar to those owned by luxury brands, which would lead to confusion among consumers about the distinctive features of the plaintiff's and defendant's designs.<sup>91</sup> Thus both copyright and design law guard against unauthorized uses that would lead to confusion about distinctive features of works or designs. In this way, they function to maintain the economic and cultural values of luxury products.

Trademark law further brings confusion-based protection into a new dimension of guarding against consumer confusion about the sources of luxury goods or services. To this end, it prohibits use of a sign that would lead to confusion about the source of goods or services and would further result in the diversion of consumers from one trademark to another. Many luxury companies heavily rely on trademark protection and regard their trademarks as essential to their business because it has the "commercial magnetism" to attract consumers to buy their products.<sup>92</sup>

Moreover, the relatively higher threshold that must be met to gain protection in copyright and design law makes the more readily attainable trademark-based anti-confusion protection critically important for luxury companies.<sup>93</sup> By guarding against imitative copying acts that may harm the economic and/or cultural value of luxury products, anti-confusion protection has played an increasingly important role in maintaining the distinction of luxury products in the consumer market. For example, in *Gucci America, Inc. v. Dart Inc.*,<sup>94</sup> the defendant retailer was enjoined

<sup>89</sup> *Id.*

<sup>90</sup> See Scott J. Palmer, *A Defining Case for Copyright Protection of Architectural Designs in the PRC: Analysis of the Porsche v. Beijing Techart Case*, BAKER & MCKENZIE CHINA LEGAL DEVELOPMENTS BULLETIN (Oct. 2009), available at [http://www.bakermckenzie.com/files/Publication/799d8bbc-5f6d-460e-9ed5-99659ef95baa/Presentation/PublicationAttachment/6aae1082-40d4-4790-bd35-40285767e6e3/bk\\_china\\_cldb\\_octdec09.pdf](http://www.bakermckenzie.com/files/Publication/799d8bbc-5f6d-460e-9ed5-99659ef95baa/Presentation/PublicationAttachment/6aae1082-40d4-4790-bd35-40285767e6e3/bk_china_cldb_octdec09.pdf).

<sup>91</sup> *Gorham Company v. White*, 81 U.S. 511, 526 (1871) ("We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.") (emphasis added).

<sup>92</sup> *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942) ("A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol.")

<sup>93</sup> First, it is widely accepted that copyright does not extend protection to fashion designs that are mostly useful articles (such as garment and shoe designs) rather than purely artistic works. Copyright law is designed to protect only the aesthetic elements in artistic works. It does not, however, protect the functional aspects of artistic works. The aesthetic elements of most fashion designs are routinely dictated by, and cannot be separated from, their utilitarian functions (such as providing warmth or helping body movement). Second, patent law (design patents included) sets up patentability standards that are too high for fashion designs to meet. Very few fashion designs are novel enough to receive patent protection. Moreover, the process of obtaining patent protection, in most cases, is too long for fashion designers. For example, it usually takes about two years to successfully register a design patent. By the time a grant of design protection is secured, the design itself has little commercial value because rapidly developing fashion trends may completely render it obsolete within two years' time. See generally CHRISTINE COX & JENNIFER JENKINS, *THE NORMAN LEAR CENTER ENTERTAINMENT, BETWEEN THE SEAMS, A FERTILE COMMONS: AN OVERVIEW OF THE RELATIONSHIP BETWEEN FASHION AND INTELLECTUAL PROPERTY* (2005), available at [www.learcenter.org/pdf/RTS\\_JenkinsCox.pdf](http://www.learcenter.org/pdf/RTS_JenkinsCox.pdf).

<sup>94</sup> 715 F. Supp. 566 (S.D.N.Y. 1989).

from selling counterfeit Gucci goods. The court expounded on the role of anti-confusion protection in protecting the distinction of Gucci goods:

Gucci suffers actual harm in lost sales and debasement of its reputation from the sale of counterfeit Gucci goods in the marketplace. Once a consumer buys an inferior quality counterfeit watch and experiences dissatisfaction, that consumer is less likely to buy genuine Gucci merchandise. The consumer believes that other merchandise bearing the Gucci mark will be as inferior as the counterfeit item. Others will be discouraged from acquiring a genuine Gucci because the items have become too commonplace and no longer possess the prestige and status associated with them.<sup>95</sup>

In addition, IP affords anti-dilution protection for owners of luxury brands, most of which have well-known trademarks. The dilution-based protection prohibits dilutive copying acts that would amount to infringements of IP rights chiefly by relying on trademark protection. It targets copying acts that harm the distinctiveness and/or reputation of a well-known trademark.<sup>96</sup>

With anti-dilution protection, trademark law goes beyond confusion-based protection to reinforce its function of protecting economic value by safeguarding the distinctiveness and reputation of a well-known trademark.<sup>97</sup> Luxury brands have established a high level of distinction among their consumers. With repeated exposure to a particular luxury product, consumers can develop a sophisticated image of its brand in their minds. As a result, it becomes harder for an owner of a luxury brand to prove likelihood of confusion. For example, the chairman of LVMH, Bernard Arnault, said that despite widespread copying, there was no danger that consumers would confuse the fakes with the real thing because “even the best counterfeiting . . . [is] light years away from the real product.”<sup>98</sup>

Anti-dilution protection addresses the case where there is no likelihood of confusion, but harm is still caused to the owners of well-known trademarks. Frank Schechter first spotted this problem and explained:

If “Kodak” may be used for bath tubs and cakes, “Mazda” for cameras and shoes, or “Ritz-Carlton” for coffee, these marks must inevitably be lost in the commonplace words of the language, despite the originality and ingenuity of their contrivance, and the vast expenditures in advertising them which the courts concede should be protected to the same extent as plant and machinery.<sup>99</sup>

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<sup>95</sup> *Id.* at 567.

<sup>96</sup> *See, e.g.*, Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified as amended in scattered sections of 15 U.S.C.).

<sup>97</sup> *See* Barton Beebe, The Semiotic Analysis of Trademark Law, 51 UCLA L. REV. 621, 675 (2004) (arguing that “[t]he mere ‘reproduction, counterfeit, copy, or colorable imitation’ of a trademark’s signifier is not in itself trademark infringement, nor, in fact, is the mere creation of confusion, mistake, or even deception”).

<sup>98</sup> *Louis Vuitton Opens Beijing Flagship Store*, *supra* note 74.

<sup>99</sup> Frank Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813, 830 (1927). Barton Beebe elaborates Schechter’s justification for anti-dilution protection as follows:

Schechter’s solution was to grant to owners of qualifying marks an extraordinarily broad, essentially absolute scope of rights along the product axis, so that Kodak, for example, could enjoin the use of



By preventing or stopping acts that blur the distinctiveness and tarnish the reputation of a well-known trademark, anti-dilution protection in trademark law helps owners of luxury brands maintain the uniqueness of their brands. For example, in *Cartier, Inc. v. DeZiner Wholesale, L.L.C.*, the court pointed out that Cartier consumers were sophisticated enough to tell the difference between Cartier's and the defendant DeZiner's sunglasses.<sup>100</sup> However, Cartier's distinctive reputation in the marketplace may still be harmed by the defendant's use of the Cartier mark on its packaging because "it is also likely that these sophisticated, brand conscious consumers will lose interest in the Cartier name as they see the number of inferior products in the market bearing the Cartier name grow."<sup>101</sup>

In sum, by guarding against imitative and dilutive copying acts, IP law "enables the producers of distinctive goods to control their production . . . [and to] preserve the stability of our consumption-based system of social distinction."<sup>102</sup> Therefore, it helps developers of luxury goods maintain and enhance the economic and cultural value of their products.

### B. The Shanzhai Phenomenon and IP Protection

This section will discuss the three types of copying acts involved in the *shanzhai* phenomenon: imitative copying, dilutive copying, and creative copying. It further examines the extent to which the use of these three types of copying acts has posed challenges to the IP law that lays the foundation for the success of luxury business.

#### 1. Three Forms of Copying Acts in the *Shanzhai* Phenomenon

Copying is the core of the *shanzhai* phenomenon. Things that have been copied include the names or logos of brands, the designs of products, and architecture. The first category of copying acts can be called imitative copying. These acts are done with the intention of make the products look similar to the original products that are copied. Typical examples of imitative copying include a street in Nanjing (a major city in China), where owners opened up stores with names such as "oMcMcDonald's," "Watons," "Bucksstar Coffee," and "Pizza Huh."<sup>103</sup> This street was popularly called "Shanzhai Street."<sup>104</sup> The following is a photo of the "Pizza Huh" store in "Shanzhai Street."<sup>105</sup>



its mark on any other product, regardless of how far afield that product's characteristics lay from photographic film—in other words, regardless of actual consumer confusion as to source.

Beebe, *supra* note 97, at 686.

<sup>100</sup> No. 98 Civ. 4947, 2000 WL 347171, at \*6 (S.D.N.Y. Apr. 3, 2000).

<sup>101</sup> *Id.*

<sup>102</sup> See Beebe, *supra* note 14, at 878-79.

<sup>103</sup> See Bergman, *supra* note 9, at slide 5.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Another example is the *shanzhai* iPhone.<sup>106</sup> Apple's iPhone is one of the most frequently imitated products, with at least six *shanzhai* versions in the market in China, including HiPhone, Mini iPhone, and iPhone Air. The following is a photo of the HiPhone.<sup>107</sup>



The second category of copying acts involved in the *shanzhai* phenomenon is dilutive copying. It refers to the copying activities that blur the distinctiveness, or tarnish the reputation of, the original products or services. For example, the BaiGooHoo search engine,<sup>108</sup> as shown below, purports to have incorporated the best features of the search engine services of Baidu (the leading Chinese search engine), Google, and Yahoo. In reality, BaiGooHoo is a very poor search engine, running slowly and showing few search results.

Another example is a fast food restaurant called KFG in China. The restaurant owner not only uses a name that looks similar to the giant American fast food chain KFC, but also uses a logo for the restaurant with an old man's head similar to the KFC logo.<sup>109</sup> This *shanzhai* restaurant may have tarnished the reputation of the KFC brand.

The third type of *shanzhai* activities include strong creative copying elements. This type of copying is akin to the transformative use of a copyrighted work, a legitimate copying act protected by the fair use doctrine in the United States. It "adds something new, with a further purpose or different character, altering the [copied copyrighted content] with new expression, meaning, or message."<sup>110</sup> For instance, there are people who radically transformed Fuwa, the mascots of the Beijing Summer Olympic Games, into Transformers toys, which are popularly called *Shanzhai* Fuwa Transformers.<sup>111</sup>

## 2. *Shanzhai's* Adverse Effects on IP Protection of Luxury Products

To what extent do the three kinds of copying acts involved in the *shanzhai* phenomenon affect the market of luxury products in China? At first blush, it seems that *shanzhai* goods have little to do with it, because *shanzhai* goods and luxury goods target completely different groups of

<sup>106</sup> Other similar *shanzhai* electronic products include "cheap Vertu phone[s] that incorporat[e] Ferrari designs . . . [and] a pristine new iPad that runs Windows XP." See David Rowan, *Chinese Pirates Are Tech's New Innovators*, WIRED (June 1, 2010), <http://www.wired.co.uk/news/archive/2010-06/1/chinese-pirates-are-techs-new-innovators>.

<sup>107</sup> *Top 10 Shanzhai Phenomena in 2009*, *supra* note 8.

<sup>108</sup> See BAIGOOHOO, <http://www.baigoohoo.com> (last visited Mar. 15, 2012).

<sup>109</sup> See Herman Lai, *Interesting Chinese Brands: KFG?*, M.I.C. GADGET (Sept. 22, 2010 8:30 AM), <http://micgadget.com/8444/interesting-chinese-brands-kfg/>.

<sup>110</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>111</sup> *Fuwa Transformer*, WALL ST. J., Aug. 1, 2008, <http://feer.wsj.com/tales/?p=1265>.

consumers. The former, as discussed in Part I, appeals to those with low incomes and little purchasing power. The latter serves those who can afford very expensive items; these people, theoretically and practically, would not bother to buy *shanzhai* products.

The *shanzhai*-related copying acts, however, do adversely affect the market of luxury goods in China because the copying poses grave challenges to the central legal rules of IP protection that are crucial for the manufacturers of luxury goods. Both imitative copying and dilutive copying acts raise serious concerns about infringing copyrights and/or trademarks owned by luxury companies,<sup>112</sup> which would tremendously affect the social distinction of luxury brands. Therefore, the surge of *shanzhai* products and activities in China has the potential to disrupt the legal foundation for strong IP protection of luxury products.

The lack of strong IP enforcement in China<sup>113</sup> has facilitated the *shanzhai* phenomenon's challenge to the effectiveness of IP protection that is central to luxury brands. Despite the large scale of copyright and trademark infringements, thus far there has been a lack of effective enforcement of IP rights to penalize those who have produced IP-infringing *shanzhai* products. The ambivalent and even conflicting attitudes of Chinese government officials toward the *shanzhai* phenomenon have made it more difficult to achieve adequate enforcement of IP rights. A passage from a *New York Times* report illustrates this conundrum of enforcing IP law in China:

In February 2009, a reporter asked Tian Lipu, the commissioner of the State Intellectual Property Office, whether *shanzhai* was something to be esteemed. "I am an intellectual-property-rights worker," Tian curtly replied. "Using other people's intellectual property without authorization is against the law." Chinese culture, he added, was not about imitating and plagiarizing others. But one month later, Liu Binjie, from the National Copyright Administration, drew a distinction between *shanzhai* and counterfeiting. "Shanzhai shows the cultural creativity of the common people," Liu said. "It fits a market need, and people like it. We have to guide *shanzhai* culture and regulate it." Soon after that, the mayor of Shenzhen, an industrial city near Hong Kong, reportedly urged local businessmen to ignore lofty debates about what is and isn't defined as counterfeiting and to "not worry about the problem of fighting against plagiarism" and "just focus on doing business."<sup>114</sup>

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<sup>112</sup> Phil Taylor, *Copy Culture*, CHINA LAW & PRACTICE, May 2009, at 1 ("A product could be protected by an invention patent covering the technology involved, a design patent, or a trademark, which is especially effective if the *shanzhai* item is likely to cause confusion for the public . . . . Claims can also be brought under certain provisions of the PRC Anti-unfair Competition Law. Hui says this is useful if the *shanzhai* item uses similar packaging to the original; in other jurisdictions, claimants may use the claim of passing off."). Patent infringement is not as relevant an issue when it comes to *shanzhai* cell phones because royalties have been cleared by MediaTek, a Taiwanese company that provides most of the chips used in *shanzhai* cell phones. See Lee et al., *supra* note 35 ("The MediaTek solution was also cheap—SOC chips cost about US\$15 each, and were used by both mainstream and [s]hanzhai mobile phone companies in China. MediaTek made royalty payments to the cell phone intellectual property owners, so its customers did not infringe on IP rights.").

<sup>113</sup> See, e.g., Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 2007).

<sup>114</sup> Nicholas Schmidle, *Inside the Knockoff-Tennis-Shoe Factory*, N.Y. TIMES MAG., Aug. 19, 2010, available at <http://www.nytimes.com/2010/08/22/magazine/22fake-t.html>.

In addition to eroding the effectiveness of IP protection that is key to the economic and cultural status of luxury products, the *shanzhai* phenomenon challenges the legitimacy of IP law as a whole. The *shanzhai* phenomenon has signaled to the public that unauthorized uses of IP by *shanzhai* products and activities are not necessarily illegal or illegitimate.<sup>115</sup> This popular attitude, in turn, has made effective IP enforcement even more difficult.<sup>116</sup> For example, it was reported that “[s]o far, however, China has done little to stop the proliferation of fake mobile phones, which are even advertised on late-night television infomercials with pitches like ‘one-fifth the price, but the same function and look,’ or patriotic appeals like ‘Buy shanzhai to show your love of our country.’”<sup>117</sup>

For many who are in favor of strong IP protection, the *shanzhai* phenomenon implicitly sends messages to indicate the legitimacy of IP piracy and counterfeiting.<sup>118</sup> Hence critics have repudiated the *shanzhai* phenomenon on the basis of its negative impact on IP protection.<sup>119</sup> For example, a congresswoman in China bluntly pointed out that “[i]f we don’t do something to eliminate shanzhai, we will soon see a country with a sea of similar books, TV programs, movies and dwindling cultural creativity.”<sup>120</sup> To these critics, the *shanzhai* phenomenon breeds piracy and counterfeiting activities that completely ignore IP rights. For example, interviews found that there are people who worry that

[s]hanzhai is tantamount to IP anarchy. The deeper it goes, the more damage it will create . . . . Tolerance of IP infringement culturally or socially is the first step in legitimizing copycats . . . . The concept and arguments proffered in favour of the position that shanzhai is the result of some harmless fun would no doubt inadvertently be a step backwards in the fight against IP piracy.<sup>121</sup>

This observation shows that the *shanzhai* phenomenon has threatened the economic and cultural value of goods under IP protection. It has the potential to undermine the legitimacy of IP law in general because it has fostered a culture in which people tend to tolerate and even condone a wide range of copying activities that may have infringed IP rights.

### III. RETHINKING THE ROLE OF IP LAW IN PROMOTING SOCIAL JUSTICE

At first blush, the *shanzhai* phenomenon, as Parts I and II showed, seems to be a new form of IP piracy and counterfeiting activities in China. Intuitively, it seems that IP law should be used as a legal tool to suppress the *shanzhai* phenomenon, as it has condoned violations of IP law.

<sup>115</sup> See *id.* (“The dispute revolved around shanzhai, a term that translates literally into ‘mountain fortress’; in contemporary usage, it connotes counterfeiting that you should take pride in. There are shanzhai iPhones and shanzhai Porsches.”).

<sup>116</sup> Taylor, *supra* note 112 (“When IP violation becomes acceptable, or even desirable, in the eyes of much of the public, this has an inevitable effect on the attitude and policies of IP enforcement agencies. This in turn makes it harder for IP owners to enforce their rights.”).

<sup>117</sup> Barboza, *supra* note 13.

<sup>118</sup> See, e.g., Xie Jingwei, *Anti-Shanzhai Law Proposal Sparks Row*, CHINA DAILY (Mar. 3, 2009), [http://www.chinadaily.com.cn/china/2009-03/05/content\\_7541992.htm](http://www.chinadaily.com.cn/china/2009-03/05/content_7541992.htm).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Taylor, *supra* note 112.

The following Part argues against that assertion. It contends that IP law should not simply be used as a tool to suppress the *shanzhai* phenomenon as a whole. A closer look at the economic, cultural, and political underpinnings of the *shanzhai* phenomenon reveals reasons to avoid a purely luxury market-oriented IP regime.

Moreover, a closer look at the *shanzhai* phenomenon also brings three core issues into focus at the interface between IP and social justice: the redistribution of benefits from technological development, the redistribution of cultural power, and the redistribution of sources of innovation. This Part will first discuss why the distribution of these three categories of resources is central to promoting distributive justice in IP law. It will then consider why stringent IP protection may run counter to the needs of distributing these resources, and how the *shanzhai* phenomenon has contributed to resolving these tensions.

### A. *Distribution of the Benefits from Technological Development*

#### 1. The Idea of Sharing the Benefits from Technological Development

Technological developments improve the lives of individuals as well as the social environment. For individuals, the development of science and technology provides them with enhanced capabilities to pursue their own well-being.<sup>122</sup> Biotechnological research has developed vaccines and treatments for fatal diseases that were incurable in the past; new plant varieties have provided people with benefits such as higher yields and superior nutrition; breakthroughs in information technology have revolutionized the ways in which people communicate with one another.<sup>123</sup> Moreover, technological developments have the potential of creating a better social environment. They generate economic growth by improving the efficiency of production of goods, and they facilitate civic participation in the democratic governance of social activities, creating a dynamic political structure.

As the benefits afforded by science and technology have become an indispensable part of human life, the right “to share in scientific advancement and its benefits” has been enshrined in human rights treaties.<sup>124</sup> This right guarantees that technological developments will be encouraged and protected, and further requires that governments should ensure that the public has adequate access to these technologies. If science and technology are to be of benefit to everyone, they need to be broadly disseminated.

Despite a series of breakthroughs in areas such as information technology and biological research, the past few decades have witnessed a deeply uneven distribution of the benefits from such development. The protection of the right to share in the benefits from technological developments has achieved little progress. A recent United Nations Human Development Report documented the stark disparities in the distribution of benefits from developments in medical research:

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<sup>122</sup> U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT: MAKING NEW TECHNOLOGIES WORK FOR HUMAN DEVELOPMENT 1-2 (2001) (“Throughout history, technology has been a powerful tool for human development and poverty reduction. . . . In fact, the 20th century’s unprecedented gains in advancing human development and eradicating poverty came largely from technological breakthroughs . . .”).

<sup>123</sup> See, e.g., Donald, *supra* note 30; Sun, *supra* note 4.

<sup>124</sup> See UDHR, *supra* note 23, at art. 27.1; ICESCR, *supra* note 24, at art. 15.1(b).

Some 2 billion people still do not have access to low-cost essential medicines (such as penicillin), most of which were developed decades ago. Half of Africa's one-year-olds have not been immunized against diphtheria, pertussis, tetanus, polio and measles. And oral rehydration therapy, a simple and life-saving treatment, is not used in nearly 40% of diarrhea cases in developing countries.<sup>125</sup>

The report also revealed that many new and old technologies have been unevenly disseminated despite their enormous value for individual development and social progress. These include such basic inputs as electricity, the telephone, agricultural innovations, and medical advances.<sup>126</sup> Against this backdrop, the 2009 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications<sup>127</sup> bluntly stated that “[s]ignificant disparities are increasing among States concerning the availability of resources, capabilities, and infrastructure necessary to engage in research and development. The acceleration of scientific progress is widening the divide between the most and least scientifically and technologically advanced societies.”<sup>128</sup>

## 2. IP and the Benefits from Technological Developments

IP protection has played an important role in preventing a fair distribution of the benefits from technological developments. First, by relying upon its conventional rules, IP law confers upon companies or individual researchers a set of exclusive rights over new technological developments they made. In this way, IP protection makes it harder for other researchers or ordinary people to receive benefits from technological developments. For instance, many believe that patenting genes has made “the cost of genetic tests and genetic therapies unacceptably high.”<sup>129</sup> It may have further inhibited biomedical innovation by blocking scientists’ access to genes and genetic materials essential to research.<sup>130</sup> The patenting of HIV-related drugs is another example. Scientific advances in medical research have helped to treat diseases such as HIV/AIDS, but patent protection of drugs drastically increases their prices, making them unaffordable to the poor.<sup>131</sup>

Second, new forms of protection that have been introduced to supplement IP protection also affect the distribution of benefits from technological development. These new forms of

<sup>125</sup> U.N. DEV. PROGRAMME, *supra* note 122, at 3.

<sup>126</sup> See *id.* at 39-40. See also Meghnad Desai et al, Measuring the Technology Achievement of Nations and the Capacity to Participate in the Network Age, 3 J. HUM. DEV. & CAPABILITIES 95, 99 (2002) (“[The UDNP Report shows that] [l]arge proportions of people in [developing] countries still do not have access to ‘older’ technologies such as the telephone, electricity, agricultural machines, or motorized transport.”).

<sup>127</sup> UNESCO, Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, July 17, 2009, *available at* <http://unesdoc.unesco.org/images/0018/001855/185558e.pdf>.

<sup>128</sup> *Id.* at ¶ 4.

<sup>129</sup> Robert Cook-Deegan, *Gene Patents*, in FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS 69-72 (Mary Crowley ed., 2008), *available at* <http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2174>.

<sup>130</sup> See, e.g., Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 699 (1998).

<sup>131</sup> See, e.g., Sun, *supra* note 4, at 124.

protection, technically referred to as *sui generis* systems, could not comfortably fit into the conventional IP rules but function as quasi-IP protection by providing a set of exclusive rights to their beneficiaries. For example, an effective *sui generis* protection of new plant varieties has been created for commercial plant breeders.<sup>132</sup> Under this system, commercial plant breeders have exclusive rights to prevent farmers from using new plant varieties under their control.<sup>133</sup> This has disadvantaged farmers who cultivated seeds before the *sui generis* system was established because commercial breeders rely on their unprotected work to create new protected varieties.<sup>134</sup>

Similarly, the *sui generis* protection of data compilations has caused serious concern about the free flow of knowledge and information. For the protection of non-original databases,<sup>135</sup> the EU Directive on the Legal Protection of Databases creates a new exclusive *sui generis* right for a maker of a database who has made “qualitatively and/or quantitatively a substantial investment” in the compilation of data.<sup>136</sup> This new right entitles the database maker to prevent “extraction and/or re-utilization of the whole or of a substantial part of . . . the contents of their databases.”<sup>137</sup> With the further limitations on fair use and compulsory licensing schemes,<sup>138</sup> the *sui generis* protection of databases in the European Union may lock up non-copyrightable information and knowledge. It also gives rise to the concern that the cost of getting access to information, be it copyrightable or not, will rise for ordinary users.<sup>139</sup>

### 3. *Shanzhai* and the Benefits from Technological Developments

How can the law address the tension between the distribution of the benefits from

<sup>132</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1197 (1994), Art. 27.3 (b) (requiring WTO member states to provide protection for plant varieties either by patents or by an effective *sui generis* system, or a combination of the two).

<sup>133</sup> See *International Convention for the Protection of New Varieties of Plants*, WORLD INTELLECTUAL PROPERTY ORGANIZATION art. 14 (Dec. 2, 1961), available at [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?doc\\_id=143912&file\\_id=193358](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=143912&file_id=193358).

<sup>134</sup> See, e.g., LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 381-93 (2011) (discussing the contributions of farmers, particularly “indigenous and small-scale farmers” to the cultivation and preservation of diverse seed varieties).

<sup>135</sup> Both the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the WIPO Copyright Treaty require their contracting parties to provide copyright protection of original databases. See Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 132 at Art. 10.2.; WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNR/DC/94, Art. 5.

<sup>136</sup> Council Directive 96/9, art. 7.1, 1996 O.J. (L 077) (EC).

<sup>137</sup> *Id.* The *sui generis* protection of non-original databases initially lasts for fifteen years. The Directive, however, offers longer, and maybe perpetual, *sui generis* protection for a database that underwent any qualitative or quantitative changes to its contents and thus constitutes a new substantial investment.

<sup>138</sup> Limitations or exceptions to database protection are narrowly crafted. It is posited that the drafters of the Directive intended to “narrow the educational and scientific communities’ ability to invoke ‘fair use’ with respect to copyrightable databases under prior law.” J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 79 (1997). In addition, the initial proposal’s compulsory licensing requirement for sole-source providers was abolished and thus was not inserted in the final version of the Database Directive. *Id.* at 83-84.

<sup>139</sup> See Haochen Sun, *Copyright Under Siege: An Inquiry into the Legitimacy of Copyright Protection in the Context of Global Digital Divide*, 35 INT’L REV. INDUS. PROP. & COPYRIGHT L. 192 (2005).

technological development and intellectual property protection? The *shanzhai* phenomenon raises anew the question of how IP law can contribute to a fair distribution of benefits from technological development among citizens. It presents a novel means with which we can make IP protection function to help the poor get better access to technology and cultural resources.

First, many *shanzhai* companies offer high-tech products at relatively low prices to poor people living in rural China or migrant workers in big cities.<sup>140</sup> *Shanzhai* products are usually much cheaper than those with high-profile trademarks such as Apple and Nokia, but they offer a wide range of functions that are as good as those offered by high-profile companies.<sup>141</sup> For instance, *shanzhai* cell phones help millions of people who cannot afford high-end brands gain access to a wide range of advanced communications technologies.<sup>142</sup>

Moreover, *shanzhai* companies manufacture and market products that are tailor-made for the special needs of low-income people. For example, there are *shanzhai* cell phones with seven speakers designed for peasants who can only hear ring tones from a distance when they are working on farmland, or with two SIM card slots<sup>143</sup> and an extraordinarily durable battery.<sup>144</sup> In addition, *shanzhai* companies have produced cell phones that are designed for senior citizens with visual or hearing impairments.<sup>145</sup> By contrast, high-profile or luxury companies rarely bother to try to manufacture and market products for such non-luxury niche markets.

In addition, *shanzhai* companies have also helped poor people in other developing countries get access to low-priced cell phones with modern communications technology. It was estimated that out of the roughly 140 million *shanzhai* mobile phones produced in China in 2009, about 100 million were exported to foreign countries.<sup>146</sup> Sixty percent of those cell phones were shipped to developing countries in the Asia-Pacific region, and they constituted about 30% of mobile phone sales in these countries.<sup>147</sup> Others were exported to African and Southern American countries.<sup>148</sup>

How are *shanzhai* cell phone companies able to compete with high-profile companies by offering much cheaper cell phones? First, MediaTek, a company based in Taiwan, provides relatively inexpensive cell phone chips for *shanzhai* companies.<sup>149</sup> Its chips enabled *shanzhai*

<sup>140</sup> EDWARD TSE, ET AL., BOOZ & COMPANY, SHAN ZHAI: A CHINESE PHENOMENON 2-3 (2009), available at [http://www.booz.com/media/file/Shan\\_Zhai\\_A\\_Chinese\\_Phenomenon\\_en.pdf](http://www.booz.com/media/file/Shan_Zhai_A_Chinese_Phenomenon_en.pdf) (“By boosting the range of available products, *ShanZhai* companies offer consumers more choice at lower price points—an important advantage in the current economic climate.”).

<sup>141</sup> Lee et al., *supra* note 35, at 2 (“In all cases, [s]hanzhai mobile phones were far cheaper than products with similar features produced by either global or local branded manufacturers.”).

<sup>142</sup> Donald, *supra* note 30, at 3, 5 (arguing that while “copies or adaptations of brand originals are sold at vastly decreased prices, [shanzhai] helps younger people gain access to the application platforms of high-end brands, and to the illicit sim cards available in many small street shops”).

<sup>143</sup> Rowan, *supra* note 106.

<sup>144</sup> YI-CHIEH JESSICA LIN, FAKE STUFF: CHINA AND THE RISE OF COUNTERFEIT GOODS 20 (2011) (discussing the technology used by *shanzhai* cell phones to make batteries last longer).

<sup>145</sup> Herman Lai, *Shanzhai Phone Comes With Interchangeable Keyboard and Magnifying Glass*, M.I.C. GADGET (Aug. 2, 2010), [micgadget.com/6634/shanzhai-phone-comes-with-interchangeable-keyboard-and-magnifying-glass](http://micgadget.com/6634/shanzhai-phone-comes-with-interchangeable-keyboard-and-magnifying-glass).

<sup>146</sup> Lee et al., *supra* note 35, at 12.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 6.



companies to design new handset features and assemble remaining cell phone components.<sup>150</sup> Second, imitating the products of high-profile companies is crucial to *shanzhai* companies in the early stages of their development. To minimize the cost of production, most *shanzhai* companies do not have independent design and marketing teams.<sup>151</sup> Borrowing or remixing the core features of products from high-profile brands enabled them to quickly design cell phones with new features and circulate them successfully in the market.<sup>152</sup>

Cell phones are important for a large number of people in China with low incomes because modern communication technology enables these people to share their feelings and thoughts and learn about various social issues such as housing prices and job opportunities. Wherever they are, cell phones help them obtain an instant connection with the rest of the world. *Shanzhai* cell phones provide users with access to WiFi, 3G networks, and e-books. Commentators have stated that the ubiquity of cell phones is crucial to building a mobile civil society in China.<sup>153</sup> *Shanzhai* companies have facilitated this process by driving down the prices of cell phones so that they are affordable. The Stanford case study noted that “[r]uthless competition from Shanzhai companies made the cell phone widely available to a segment of the Chinese population that would not otherwise have been able to access mobile telecommunication, as well as consumers in many other countries.”<sup>154</sup>

## B. Distribution of Cultural Power

### 1. The Idea of Culture Power

As social beings, we live in the web of culture that shapes who we are and what we can do. We are taught how to speak a language. We are shown how to interact with others. We are encouraged to cherish things that are dear to us. These processes are the manifestations of culture on individual human beings. Sociologist Georg Simmel refers to culture as “the cultivation of individuals through the agency of external forms which have been objectified in the course of history.”<sup>155</sup>

<sup>150</sup> *Id.* (“In 2005, MediaTek introduced a turnkey solution for mobile handsets, which provided basic functionality, and enabled the user to create or design products with minimal effort, primarily by adjusting performance parameters.”); *see also* WILLY SHIH ET AL., SHANZAI! MEDIA TEK AND THE “WHITE BOX” HANDSET MARKET (2010) (discussing MediaTek’s effect on the traditional “white box” market for mobile phone handsets).

<sup>151</sup> *See* Lee et al., *supra* note 35, at 12.

<sup>152</sup> *See, e.g.,* Xing, *supra* note 47 (“Some people say that Shanzhai products are not all piracy. Some of the products were similar to those of big companies, they argue, but the Shanzhai ones also added new functions. Hiphone, for example, the Shanzhai edition of Apple’s iPhone, enables sending of multimedia short messages and receiving radio, which Apple failed to support in its products.”).

<sup>153</sup> *See* MANUEL CASTELLS ET AL., MOBILE COMMUNICATION AND SOCIETY: A GLOBAL PERSPECTIVE 185 (2007); *see also* JACK LINCUN QIU, WORKING-CLASS NETWORK SOCIETY: COMMUNICATION TECHNOLOGY AND THE INFORMATION HAVE-LESS IN URBAN CHINA 51 (2009) (“These [wireless] services have helped wireless technology reach large numbers of have-less users while creating significant job opportunities for the urban underclass.”).

<sup>154</sup> Lee et al., *supra* note 35, at 12.

<sup>155</sup> Donald N. Levine, *Introduction* to GEORG SIMMEL, ON INDIVIDUALITY AND SOCIAL FORMS, at xix (Donald N. Levine ed., 1971); *see also* J. M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 4-5 (1998) (“Each individual has a unique brain structure that is not merely the product of genetic inheritance but is shaped and organized in part by her experiences and activities, especially those in early childhood.”); BARBARA ROGOFF, THE CULTURAL NATURE OF HUMAN DEVELOPMENT 3 (2003) (“Human development is a cultural process. As a biological species, humans are

While we are constantly shaped by culture, we are also meaning-makers of various elements of culture. Take fashion as an example—fashion mirrors a society's culture. It is a crucial part of a pluralistic society in which knowledge-intensive creations are central to the evolution of human life. Fashion is “the eternal recurrence of the new.”<sup>156</sup> People who are engaged directly or indirectly in the fashion sector make relentless efforts to break with orthodoxies and create new fashion trends that influence our lifestyles, languages, individual beliefs, and social values.

What enables us to simultaneously be both shaped by culture and act as the meaning-makers of culture? I argue that it is cultural power<sup>157</sup> that forms the major enabling force. We are first equipped with cultural power when we are shaped by culture; we further develop our cultural power by participating in the meaning-making process by collectively changing culture. There are two kinds of culture power: the cultural power to discuss social issues and the cultural power to critique social issues. The formation and exercise of the two types of cultural power are of crucial importance to individuals and society as a whole. With respect to the former type of cultural power, we first need to gain the basic capacities to understand how to conduct discussions about social issues—this involves learning linguistic rules, including body language.<sup>158</sup> We also need knowledge concerning social issues. To discuss religion, a literary work, or a musical composition, one must learn at least certain aspects of that religion, literary work, or musical composition. We also need to develop and reinforce the willingness to participate in discourse about various social issues, whether central or peripheral to our interests. Such willingness is also necessary for us to be engaged in discourse on social issues.

The cultural power to critique social issues forms another type of cultural power, which is even higher when compared with the cultural power to discuss. This new power is intended to enable people to think critically about social issues, which is very important for individuals and society as whole. It helps people in breaking from orthodoxies that restrain creative human activities. A critical attitude toward orthodoxies allows people to enjoy enhanced freedom and creativity. Critical thinking also helps people to think more actively and deeply about how the government deals with a host of social issues, and prevents people from being indoctrinated by government propaganda.

## 2. IP and Cultural Power

Intellectual property affects the ways in which cultural power is allocated among people. By conferring upon IP holders the right to exclude others from using intangible assets under their proprietary control, IP law affects how cultural exchanges and interactions among people occur, and whether or not they enhance an individual's cultural power. The recent extensive expansion

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defined in terms of our cultural participation.”).

<sup>156</sup> WALTER BENJAMIN, *SELECTED WRITINGS*, VOLUME 4, 1938-1940, at 179 (Howard Eiland & Michael W. Jennings eds., Edmund Jephcott et al. trans., 2003).

<sup>157</sup> For a different vision of cultural power than is discussed here, see Ann Swidler, *Cultural Power and Social Movements*, in *CULTURAL SOCIOLOGY* 311, 311 (Lyn Spillman ed., 2002) (noting that under Durkheim “[c]ollective representations are not ideas developed by individuals or groups pursuing their interests . . . [but] are the vehicles of a fundamental process in which publicly shared symbols constitute social groups while they constrain and give form to individual consciousness”).

<sup>158</sup> See, e.g., IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 57 (2000) (stating that “greeting, or public acknowledgement” has important functions for democratic practice).

of IP protection<sup>159</sup> has strengthened IP holders' capacities to control the distribution of cultural power among citizens.

Take copyright law as an example. Copyright law now protects the technological measures used by copyright holders to control the public's access to and use of their copyrighted works through the Digital Millennium Copyright Act (DMCA).<sup>160</sup> The DMCA prohibits circumvention of technological measures that are employed by copyright holders to lock up works in digital form.<sup>161</sup> It further bars the manufacture and distribution of devices that can circumvent these technological measures.<sup>162</sup> Meanwhile, the DMCA only creates a few exceptions to anti-circumvention regulations, such as reverse engineering, security testing, good faith encryption research, and certain uses by nonprofit libraries, archives, and educational institutions.<sup>163</sup> In the conventional copyright system, fair use presupposes that the public first has free access to works, and then makes decisions regarding whether fair use arguments need to be made.<sup>164</sup> Now, however, free access to many works is no longer available for users because technological measures deployed by copyright holders fence off access to works and the DMCA provides penalties against circumvention of those digital fences.<sup>165</sup>

Moreover, an overly restrictive interpretation of the scope of the fair use doctrine also impedes distribution of cultural power. For example, in *Harper & Row Publishers v. Nation Enterprises*, the U.S. Supreme Court held that *The Nation's* unauthorized publication of a minor portion of an unpublished manuscript of President Gerald Ford could not constitute fair use, even though the sections quoted implicated the Watergate scandal, a significant historical event of public interest.<sup>166</sup> In rendering the decision, the Court did not examine whether the quotations would produce any public benefits, such as promoting democracy by protecting the free flow of information and freedom of expression.<sup>167</sup>

<sup>159</sup> See, e.g., Sun, *supra* note 5.

<sup>160</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Circumvention of Copyright Protection Systems, 17 U.S.C. § 1201 (2006). A few more exemptions to the ban on circumventing access controls were added later to the language of the DMCA. See 17 U.S.C. § 1201(d), (f)-(g), (j) (1999). However, these exceptions altogether eliminate fair use under the DMCA by excluding the open-ended, flexible nature of fair use. After all, section 107 of the Copyright Act never provides an exhaustive list of what constitutes fair use, as the DMCA does. See Rebecca Tushnet, I Put You There: User-Generated Content and Anticircumvention, 12 VAND. J. ENT. & TECH. L. 889, 908-09 (2010) ("[Rulemaking proceedings] produced only extremely narrow exemptions . . . [r]epeated requests for general 'fair use' exemptions have been rejected.").

<sup>164</sup> See Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 140 (1999) ("[I]t may be fair use to make nonprofit research photocopies of pages from a lawfully acquired book; it is not fair use to steal the book in order to make the photocopies.").

<sup>165</sup> See generally David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 718-19 (2000) (noting that the DMCA will hinder scholars, students, and teachers who might otherwise have a fair use right to use copyrighted materials); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93 (2010) (pointing out the underutilization of the fair use doctrine after the enactment of the DMCA).

<sup>166</sup> 471 U.S. 539, 557-69 (1985).

<sup>167</sup> Instead, the Court resoundingly denied the need to consider the implication of the defendant's unauthorized quotations for the protection of the public, rejecting the Second Circuit Court of Appeals' holding that "The Nation's use of the copyrighted material was excused by the public's interest in the subject matter." *Id.* at 569. This need was outweighed by the fact that the copyright holder had a potential market interest in licensing others to use the work and

Following Harper & Row, many courts in the U.S. have interpreted the fair use doctrine based on an individualistic vision of property rights and ignored the larger public interest in the free flow of knowledge and information.<sup>168</sup> For example, courts have repeatedly ruled that non-transformative uses,<sup>169</sup> including simple photocopying in scientific or educational settings, could potentially militate against a finding of fair use.<sup>170</sup> Courts have even ruled that any sampling from a sound recording, and perhaps even the sampling of a single note, is copyright infringement.<sup>171</sup>

### 3. *Shanzhai* and Culture Power

How should the tension between distribution of cultural power and IP protection be resolved? The *shanzhai* phenomenon has presented a radical approach through which cultural power could be redistributed from IP owners to the culturally disempowered in Chinese society.

Among the many *shanzhai* products and activities, the *Shanzhai* Olympic Torch Relay is the best example of how the *shanzhai* phenomenon has paved the way for IP protection to contribute positively to a fair distribution of cultural power. Before the 2008 Beijing Olympic Games started, the Beijing Olympic Committee and the Chinese government organized a nation-wide torch relay.<sup>172</sup> Those who were invited to participate directly in the torch relay were all high-profile sports or entertainment celebrities.<sup>173</sup> Many people in Hui County, a town in the rural

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magazine publishers could afford to pay for this use. *Id.* at 566-67. Had fair use been allowed on the basis of protecting the public interest, the market value of the copyrighted work would have likely been harmed. The Court specifically stated that “[to] propose that fair use be imposed whenever the ‘social value [of dissemination] . . . outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.” *Id.* at 559 (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

<sup>168</sup> See, e.g., Sun, *supra* note 5 (critiquing the notion in copyright law that fair use should be seen as an affirmative defense against allegations of copyright infringement); NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 64 (2008) (discussing the Blackstonian property-centered view of fair use that has been widely used by courts after the *Harper & Row* decision).

<sup>169</sup> While transformative uses should deserve heightened judicial protection, many courts have taken it for granted that a non-transformative use of a work may amount to a copyright infringement. Unlike transformative uses, non-transformative uses simply copy the original copyrighted works, producing no new copyrighted works and making no new contributions to enrich culture. See generally Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555 (2004) (“While extrajudicial and structural limits to copyright are under attack, fair use law has been realigned around transformative use, in which the user does more than simply copy the original work. Transformation is not sufficient to produce a fair use finding, but it is increasingly necessary.”).

<sup>170</sup> See, e.g., *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (finding that despite the non-profit nature of the use, the fact that the defendant simply deleted the name of the author and appropriated the same work as his own went against the application of the fair use doctrine); *L.A. Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at \*75 (C.D. Cal. 2000) (“Conversely, the amount and substantiality of the copying and the lack of any significant transformation of the articles weigh heavily in favor of [the copyright holders].”).

<sup>171</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 803-04 n.18 (6th Cir. 2005) (stating that sampling a single note is outside of the scope of this particular decision but emphasizing that sampling is never accidental and requires a license).

<sup>172</sup> See *Beijing Olympic Torch Relay Starts*, CHINA VIEW (Mar. 31, 2008), [news.xinhuanet.com/english/2008-03/31/content\\_7888507.htm](http://news.xinhuanet.com/english/2008-03/31/content_7888507.htm).

<sup>173</sup> See *2008 Summer Olympics Torch Relay*, WIKIPEDIA, [www.en.wikipedia.org/wiki/2008\\_Summer\\_Olympics\\_torch\\_relay](http://www.en.wikipedia.org/wiki/2008_Summer_Olympics_torch_relay) (last visited Mar. 20, 2012) (reporting that the torch relay in Hong Kong only included “celebrities,

part of Henan Province, were disappointed with the way that the Olympic torch relay was handled.<sup>174</sup> In their opinion, the involvement of the celebrities marginalized ordinary people in the whole event.<sup>175</sup> Therefore they organized another Olympic torch relay as shown in the photo below.<sup>176</sup>



People took pictures of this activity and posted them on the Internet, and it stirred a heated online discussion about this “Shanzhai Olympic Torch Relay.”<sup>177</sup> Meanwhile, other similar *shanzhai* Olympic torch relays occurred in different parts of China.<sup>178</sup> To facilitate such activities, some companies produced plastic torches that looked like the Olympic torches used in the official torch relay and sold these “Shanzhai Olympic Torches” at very low prices.<sup>179</sup>

Central to the *Shanzhai* Olympic Torch Relay and its affiliated products was the use of the Olympic logos. Without these logos, these *shanzhai* activities and products would not have drawn attention to the problems with the official Olympic Torch Relay. However, the Beijing Olympic Committee had trademark rights in the Olympic logos. In 2002, the Chinese State Council promulgated the Regulations on the Protection of Olympic Symbols.<sup>180</sup> Article 4 prohibited unauthorized use of any Olympic logos.<sup>181</sup> Therefore, the use of Olympic logos by these *shanzhai* activities and products technically violated the trademark right enjoyed by the Beijing Olympic Committee.

This kind of “trademark infringement,” however, redistributed cultural power to those who had no direct involvement in the official Olympic Torch Relay.<sup>182</sup> It gave people the cultural power to discuss the social issues surrounding how the Olympic Torch Relay should be organized, in particular regarding whether ordinary people should be selected to participate in the

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athletes and pro-Beijing camp politicians”).

<sup>174</sup> The Olympic Torch Relay was discussed in online forums that have since been deleted.

<sup>175</sup> *Id.*

<sup>176</sup> Jingwei, *supra* note 117.

<sup>177</sup> *See supra* note 174.

<sup>178</sup> *Id.*

<sup>179</sup> Miao Deyu, *Shanzhaiban Aoyun Huojia Xianshen [The Emergence of the Shanzhai Olympic Torch]*, SHANZHAJI (July 12, 2008), <http://www.shanzhaiji.cn/news/20080712/3668.html>.

<sup>180</sup> REGULATIONS ON THE PROTECTION OF OLYMPIC SYMBOLS (Feb. 4, 2002), *available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=181604](http://www.wipo.int/wipolex/en/text.jsp?file_id=181604).

<sup>181</sup> *Id.* Article 4 establishes that “[t]he right holders of the Olympic symbols enjoy the exclusive rights of Olympic symbols in accordance with these Regulations. No one may use Olympic symbols for commercial purposes (including potential commercial purposes, and the same below) without the authorization of the right holders.” *Id.*

<sup>182</sup> *See* Jingwei, *supra* note 118 (reporting that some people think “that it is unfair to label shanzhai culture as IPR violators, as many of the works are creative, such as the ‘Shanzhai Olympic Torch Relay’ held by villagers from Hui County, Henan Province [in July 2008]”).

event.<sup>183</sup> This activity led people to take part in the discussion, particularly in Internet discussion forums.<sup>184</sup>

Additionally, it gave people the cultural power to critique relevant social issues. The organizers of the *Shanzhai* Olympic Torch Relay and almost all of those who engaged in the online discussion had a critical attitude toward the official Olympic Torch Relay.<sup>185</sup> They organized activities or joined discussions to criticize how the Beijing Olympic Committee and Chinese government excluded ordinary people from participating in the official Torch Relay.<sup>186</sup>

Thus, *shanzhai* activities of this type equip ordinary people with the means to voice their discontent about pressing issues such as widening inequality and increased political censorship in Chinese society. Other examples of these activities include the *Shanzhai* Nobel Prize, *Shanzhai* Lecture Room, and popular *shanzhai* movies that parody high-end blockbusters.<sup>187</sup> The events that are criticized or parodied by *shanzhai* cultural activities are often dominated by government officials and celebrities, and lack participation by ordinary people. By using some elements of these events, which are protected by IP law, *shanzhai* activities act as a cultural critique of dominant society. *Shanzhai* mobilizes grassroots power and fosters wider public participation in economic, cultural, and political life.

### C. Distribution of Sources of Innovation

#### 1. The Idea of Sources of Innovation

Innovation is the bedrock of societal development. It creates both breakthroughs and incremental changes in technology and culture. The sources where innovation is generated therefore are of vital importance. Conventionally, producers of goods are thought of as the major sources of innovation.<sup>188</sup> Producer innovation creates the product of a single, non-collaborating firm that anticipates profits from a new technology or a new product design.<sup>189</sup> Electronic products merchandized by Apple Inc. exemplify producer innovation. Apple Inc. invested heavily in developing its products and market strategies, increasing the products' popularity.<sup>190</sup>

In addition to innovation generated by producers, users of goods also engage in activities

<sup>183</sup> See, e.g., *Shanzhai*, supra note 31 (pointing out that those who participated in the discussion about the *Shanzhai* Olympic Torch Relay were "arguably just for the participants to have fun and to experience being the authority.").

<sup>184</sup> See supra note 174.

<sup>185</sup> Id.; *Shanzhai*, supra note 31.

<sup>186</sup> Id. (pointing out that the *Shanzhai* Olympic Torch Relay facilitated the critique of "authoritative events in which grass-roots power usually has no participating role").

<sup>187</sup> See, e.g., Canaves & Ye, supra note 13, at A13 ("A Beijing man, repeatedly rebuffed in his attempts to appear on a popular CCTV academic program, now produces his own 'Shanzhai Lecture Room' show on the Internet, in which he holds forth on the heroes of the Song dynasty for a six-hour stretch.").

<sup>188</sup> See Carliss Y. Baldwin & Eric A. Von Hippel, *Modeling a Paradigm Shift: From Producer Innovation to User and Open Collaborative Innovation 2* (Harvard Bus. Sch. Fin., Working Paper No. 10-038, Aug. 2010), available at <http://ssrn.com/abstract=1502864>.

<sup>189</sup> Id. at 9 ("A producer innovator is a single, non-collaborating firm. Producers anticipate profiting from their design by selling it to users or others: by definition they obtain no direct use-value from a new design.").

<sup>190</sup> See ADAM LASHINSKY, *INSIDE APPLE: HOW AMERICA'S MOST ADMIRE--AND SECRETIVE--COMPANY REALLY WORKS* 55 (2012).

that generate innovation. User innovation is derived from open and collaborative projects.<sup>191</sup> Examples of user innovation include open source software and free encyclopedias such as Wikipedia, which exhibit the ability of users to develop new uses for existing products.<sup>192</sup>

The conventional idea about innovation and its sources focuses on the development of technologies: how to foster the development of new technologies and the ways in which technologies are used to generate economic growth or business development.<sup>193</sup> Innovation that leads to increased productivity is a fundamental source of increasing wealth in an economy. Recognizing this, the Global Innovation Index divides innovation into two parts: innovation inputs and outputs.<sup>194</sup> Innovation inputs include government and fiscal policy, education policy, and the innovation environment.<sup>195</sup> Innovation outputs included patents, technology transfer, and other R&D results, including business performance, such as labor productivity and total shareholder returns, and the impact of innovation on business migration and economic growth.<sup>196</sup>

This conventional idea about innovation and its sources should be broadened to cover innovation in using cultural power. This mode of innovation promotes the cultural dynamics of a society. In particular, it is an important vehicle for people to convey their critiques of cultural phenomena. It also reinforces people's messages by creating sound bytes or eye-catching effects. Take parodies of Lady Gaga's songs for example. YouTube users have made parodies of each of her blockbuster songs, poking fun at Lady Gaga's provocative costumes or criticizing her unhealthy influence on adolescents.<sup>197</sup> Twitter is another example of the innovative uses of cultural power. Twitter was used to provide live updates of vote counting in the recent election in Singapore<sup>198</sup> and court hearings in the United Kingdom.<sup>199</sup> These were uses of social media that had not been envisioned when YouTube or Twitter were founded. It is the users of YouTube and Twitter who have collectively created those innovative ways to produce and disseminate information over the Internet.

## 2. IP and Sources of Innovation

IP plays a big part in affecting how sources of innovation can be distributed. IP protection of fashion design is an example. Fashion's economic and cultural value stems first

<sup>191</sup> See ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 2, 10, 72–73, 173 (2005) (noting that unrestricted access to products has resulted in important user innovations, including advances in mountain biking, wind surfing, medical equipment, and farming equipment).

<sup>192</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 70–71 (2006).

<sup>193</sup> See, e.g., PAUL HEYNE ET AL., *THE ECONOMIC WAY OF THINKING* 317–18 (12th ed. 2010) (“Technical innovation may in fact be the most powerful of the forces that propel economic growth. . . . Technological innovation does not fall from the heavens; it is created by people interacting in the course of trying to promote the projects that interest them.”).

<sup>194</sup> INSEAD, *THE GLOBAL INNOVATION INDEX 2011: ACCELERATING GROWTH AND DEVELOPMENT*, [http://www.globalinnovationindex.org/gii/GII%20COMPLETE\\_PRINTWEB.pdf](http://www.globalinnovationindex.org/gii/GII%20COMPLETE_PRINTWEB.pdf).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See, e.g., *Lady Gaga – Poker Face – Parody (“Outer Space”)*, YOUTUBE (June 1, 2009), <http://www.youtube.com/watch?v=h47fNaOb-JU>.

<sup>198</sup> *Singapore Election @sgelection*, TWITTER, <http://twitter.com/#!/sgelection> (last visited Feb. 14, 2012).

<sup>199</sup> See *Lord Chief Justice Allows Twitter in Court*, BBC NEWS (Dec. 20, 2010, 5:51 ET), <http://www.bbc.co.uk/news/uk-12038088>.

from the creative work of designers. However, the conventional IP system has not yet provided fashion designs with protection as strong and effective as it does for the creative work embodied in novels, poems, and inventions. In fact, IP protection in fashion is still very limited, making it hard for fashion designers to take legal action against the copying of their designs.<sup>200</sup>

Given the lack of effective protection for fashion designs in the conventional IP system, policymakers and scholars have engaged in a heated debate about whether there is a need to reform the IP system to protect the fashion industry.<sup>201</sup> The European Union took the lead by setting up a Community Design System.<sup>202</sup> While the system requires the filing of an application for designs to be registered for protection, unregistered designs still can receive automatic protection once they are published or used in trade.<sup>203</sup> Thus, the system provides protection of fashion designs whether they are registered or not. Legislators in the United States are considering whether to develop a system of legal protection for fashion designs. The Innovative Design Protection and Piracy Prevention Act, submitted to Congress in August 2010, is the latest legislative proposal.<sup>204</sup> It would give three-year copyright protection to original and novel designs.<sup>205</sup>

However, some scholars and policymakers argue that fashion has thrived very well in the absence of strong IP protection. First, fashion necessitates borrowing from earlier designs, something made possible by weak IP rules.<sup>206</sup> Second, copying results in greater sales of fashion products, shortening the lifespan of fashion trends.<sup>207</sup> This, in turn, spurs innovation in the fashion industry as a whole.

Against this backdrop, beefing up IP protection of fashion designs is likely to dampen the vibrancy of innovation in the fashion industry. It would make it much harder for many fashion designers to borrow from existing design elements and remix them with their own ideas. Therefore, stronger IP protection might hamper the many designers holding no IP rights from enriching the fashion industry.

### 3. *Shanzhai* and Sources of Innovation

The *shanzhai* phenomenon further raises the question of how IP law can help achieve a socially beneficial distribution of sources of innovation. The core concern is how IP law should

<sup>200</sup> See C. Scott Hemphill & Jeannie Suk, The Law, Culture, and Economics of Fashion, 61 STAN. L. REV. 1147, 1150 (2009).

<sup>201</sup> *Id.* at 1150-51.

<sup>202</sup> Council Regulation 6/2002, 2002 O.J. (L 3) 1 (EC), available at <http://oami.europa.eu/en/design/pdf/6-02-CV-en.pdf>.

<sup>203</sup> *Id.* at art. 11.

<sup>204</sup> S. 3728, 111th Cong. (2010).

<sup>205</sup> *Id.* at § 2.

<sup>206</sup> See, e.g., Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1704 (2006) (noting that design patents are unavailable in practice since they are only available for designs that are truly “new,” and not for “reworkings” of earlier designs).

<sup>207</sup> See generally Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1409 (2005) (“[V]isible sales of counterfeits act as an advertising mechanism that coordinates non-elite consumers’ expectations as to the purchasing behavior of elite and certain other non-elite consumers.”).



facilitate user innovation<sup>208</sup> and innovation in the use of cultural power. *Shanzhai* products are the result of collaboration fostered among sectors of the public, which enhances technological and cultural development. Most *shanzhai* products and activities involve different types of user innovation and innovation in the exercise of cultural power.

*Shanzhai* production primarily operates through an open-access model, which encourages an ethos of sharing information without IP protection. With the emergence of *shanzhai* cell phones, it has become commonplace to share information over the Internet about designing and producing cell phones. There are websites, blogs, and online discussion forums dedicated to providing details about the latest trends and technologies for cell phones.<sup>209</sup> One online discussion forum for sharing such information, which is divided into more than forty sections, had nearly 130,000 registered users and 800,000 posts in March 2009.<sup>210</sup> The dual SIM card function installed in many *shanzhai* cell phones<sup>211</sup> further illustrates the open-ended model of user innovation unleashed by the *shanzhai* phenomenon. Users who contributed to the production of *shanzhai* phones came up with this function after they found it inconvenient to use cell phones with only a single SIM card. (Producers of mainstream cell phones did not bother to address this problem for ordinary users.) *Shanzhai* cell phone users also participate in online discussions about circumventing cell phone software that is not compatible with *shanzhai* phones or has undesirable features that mislead users to pay for extra services. One outcome has been active communication concerning how to jailbreak smart phones such as the iPhone.<sup>212</sup>

Moreover, there are *shanzhai* activities that have promoted innovation in the use of cultural power. The *Shanzhai* Spring Festival Gala exemplifies this cultural role of the *shanzhai* phenomenon. The China Central TV Station (CCTV) in Beijing holds an annual Spring Festival Gala on the eve of the Chinese New Year to celebrate the most important day of the year in Chinese society.<sup>213</sup> The Gala uses entertainment programs to portray the positive role played by the Communist Party in making China economically rich and culturally dynamic.<sup>214</sup> The Gala, however, ignores pressing social issues that are highly problematic in China. Against this backdrop, a group of people organized the *Shanzhai* Spring Festival Gala to mock the official

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<sup>208</sup> For further discussion about the relationship between IP and user innovation, see William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1431-32 (2010); Katherine J. Strandburg, *Users as Innovators: Implications for Patent Doctrine*, 79 U. COLO. L. REV. 467, 469 (2008).

<sup>209</sup> Qiu Linchuan, *Wangluo Shidai De Shanzhai Wenhua* [The *Shanzhai* Culture in the Network Age], 121 ERSHIYI SHIJI [TWENTY FIRST CENTURY] 121, 126 (April 2009).

<sup>210</sup> *Id.*

<sup>211</sup> See Rowan, *supra* note 106.

<sup>212</sup> Jailbreaking a smart phone such as the iPhone allows individuals to run unapproved applications. To jailbreak, the user replaces the firmware (the operating system software controlling basic phone functions) with a modified version. The modified version of the code removes any requirement that third-party applications have completed the approval process. The benefits of jailbreaking include the capability to utilize additional unapproved applications and customizations. For some iPhone hobbyists, jailbreaking “is akin to customizing a fancy car — it simply allows owners to personalize the look of their devices, turning their phones into a brag-worthy accessory and status symbol.” In 2009, about 2.3 million iPhones had been jailbroken. Jenna Wortham, *Unofficial Software Incurs Apple’s Wrath*, NEW YORK TIMES (May 12, 2009), <http://www.nytimes.com/2009/05/13/technology/13jailbreak.html>.

<sup>213</sup> Canaves & Ye, *supra* note 13.

<sup>214</sup> *Id.* (“China Central Television’s Lunar New Year gala regularly features movie stars such as Jackie Chan and Zhang Ziyi, hundreds of choreographed dancers and lingering close-ups of major policy makers. The state-sponsored performance, which airs Sunday, annually rates as one of China’s most-watched shows.”).

event hosted by CCTV.<sup>215</sup> The idea to host a *shanzhai* gala developed from individuals who watched the CCTV Gala for years and were upset about the tribute it paid to the Communist Party.<sup>216</sup>

The structure of the *Shanzhai* Spring Festival Gala closely resembles the CCTV Gala, but the *Shanzhai* Spring Festival Gala parodies the CCTV Gala as too conventional and politically motivated. The *Shanzhai* Gala also emphasizes a host of pressing issues in contemporary society in China by staging specific programs that make fun of well-known songs or stage dramas featured in the CCTV Gala.

All these *shanzhai* products and activities make unauthorized use of IP rights actually or potentially owned by established companies. The products and activities include software, gala program plans, and entertainment programs protected by copyright law, as well as cell phone designs and brands protected by design and trademark law. Yet the people involved in making *shanzhai* products and activities “creatively” copied elements of these IP assets to unleash user innovation in addition to innovation generating cultural power. For these reasons, cultural critics in China have regarded these forms of *shanzhai* as “a means of self-expression . . . [that] gives people another choice and the possibility of resisting dominant cultural values.”<sup>217</sup>

#### IV. PROMOTING SOCIAL JUSTICE THROUGH IP LAW: LESSONS FROM THE SHANZHAI PHENOMENON

The preceding part of this article explored the ways in which the *shanzhai* phenomenon has contributed to a fair sharing of three kinds of resources that ought to be redistributed in the area of intellectual property law. But there remains a question as to whether or not the redistributive schemes initiated by the *shanzhai* phenomenon will reconfigure the fundamental IP protections that are central to the success of luxury companies. When we take into account the fact that China has long been notorious for rampant IP piracy and counterfeiting activities, the IP protection question deserves further detailed discussion.

“[T]o steal a book is an elegant offense” is a theme in Chinese culture that Professor William Alford explored,<sup>218</sup> raising the question of whether *shanzhai* has been used as a defense that legitimizes its existence.<sup>219</sup> It is true that the *shanzhai* products branded as “ADIDOS,” “LU,” “SAMSUNG,” and “LIKE,” bear strong resemblances to the original ADIDAS, LV, SAMSUNG, and NIKE products and have infringed on IP rights enjoyed by the owners of these brands. Accordingly, critics argue that IP law should not allow the *shanzhai* models to be used by counterfeiters as a camouflage for blatant infringing activities.<sup>220</sup> Without strong IP protection, creators would lack incentive to create and disseminate innovative products.<sup>221</sup>

Yet a closer look at the *shanzhai* phenomenon provides a different vantage point from

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at A13.

<sup>218</sup> WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 1-3 (1995).

<sup>219</sup> See, e.g., Schmidle, *supra* note 113 (“The dispute revolved around shanzhai, a term that translates literally into ‘mountain fortress’; in contemporary usage, it connotes counterfeiting that you should take pride in. There are shanzhai iPhones and shanzhai Porsches.”).

<sup>220</sup> See *supra* text accompanying notes 115-17.

<sup>221</sup> See Jingwei, *supra* note 118.

which we can reconsider these arguments. IP law should be used as a tool to penalize the *shanzhai* products and activities that amount to blatant, willful infringements of IP rights, but should not be used to suppress the *shanzhai* phenomenon as a whole. This is because, as I show in the following Part of this Article, the *shanzhai* phenomenon carries substantive and symbolic value for redistributing the three kinds of resources discussed in Part III. Both the substantive and symbolic values are vital for reducing inequality caused by the IP system.

### A. *The Substantive Value*

#### 1. IP and the Rawlsian Difference Principle

Commentators have applied the Rawlsian Difference Principle to consider the ways in which inequality issues caused by IP protection can be addressed.<sup>222</sup> Hailed as the foremost rule to promote justice in a liberal society, the Rawlsian Difference Principle dictates that social inequalities are justified if and only if they work to the benefit of the least advantaged in society.<sup>223</sup> Rawls pointed out that “social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.”<sup>224</sup> Applying the principle to the “likely medical needs” of the least advantaged, Rawls stated that “[w]ithin the guidelines of the difference principle, provisions [of medicines] can be made for covering these needs up to the point where further provision would lower the expectations of the least advantaged.”<sup>225</sup>

Following this principle, many scholars and activists have urged that IP laws should be reformed to accommodate the needs of the most disadvantaged, such as those who have no or limited access to HIV-related drugs<sup>226</sup> or copyrighted textbooks.<sup>227</sup> In his seminal book justifying IP, Robert Merges draws on the Difference Principle to argue that “the inequality created by the IP system is a justifiable form of inequality when viewed from the perspective of society’s most

<sup>222</sup> See *supra* text accompanying notes 20-22.

<sup>223</sup> RAWLS, *supra* note 1, at 65 (stating that “the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society”).

<sup>224</sup> *Id.*

<sup>225</sup> JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 173 (Erin Kelly ed., 2001).

<sup>226</sup> See, e.g., Fisher & Syed, *supra* note 20, at 627-28 (discussing the possibility of applying the Rawlsian Difference Principle as the moral basis to address the tension between patent protection of HIV-related drugs and the need to treat AIDS and other diseases in the developing world); Gewertz & Amado, *supra* note 20, at 303 (“The redistribution of [the anti-HIV medication] itself to treat AIDS patients or the redistribution of the royalties acquired from [the anti-HIV medication] to subsidize poorer patients, both create more equal distributions of basic liberties and benefits the least advantaged.”); Lee, *supra* note 20, at 949 (citing the Rawlsian Difference Principle to argue that to enhance access to patented health technologies for low-income communities “may in some instances require targeted efforts to reach the poorest members of society”); Linarelli, *supra* note 20, at 215 (“The current regime of global intellectual property rights also seems to violate the Rawlsian difference principle. . . . The current global intellectual property system, with patent protecting prices, makes the worst off groups, the poorest of the poor in low income countries, even worse off while benefiting better off groups such as pharmaceutical firms in high income countries.”). But cf. David B. Resnik, *Fair Drug Prices and the Patent System*, 12 HEALTH CARE ANALYSIS 91, 93-94 (2004) (arguing that “the patent system is fair in a national context because it respects intellectual property rights and it benefits the least advantaged members of society by providing incentives for inventors, investors, and entrepreneurs”).

<sup>227</sup> See, e.g., Chon, *supra* note 21.

disadvantaged citizens.”<sup>228</sup>

In this section, I argue that the Rawlsian Difference Principle is inadequate to deal with inequality issues caused by IP protection. When applying this principle, many scholars fail to account for the two issues central to promoting justice within the ambit of IP law: first, what ought to be distributed or redistributed, and second, who ought to be the beneficiaries of pro-justice redistribution in the IP system. I contend that the three redistributive justice mandates discussed in this article have the potential to overcome the limitations of the Rawlsian Difference Principle for these issues. Moreover, this theory paves the way for rethinking how to take social justice issues seriously in the area of IP law.

The first problem with the Rawlsian Difference Principle is its limited ability to define the nature of the social resources that ought to be subject to redistribution for the purpose of promoting justice. In *A Theory of Justice*, Rawls states that the Difference Principle simply constitutes a primary rule that governs how primary social goods should be redistributed in a property-owning democracy.<sup>229</sup> Primary social goods, according to Rawls, include rights, liberties, opportunities, income, and wealth.<sup>230</sup> A property-based adjustment scheme is very important to achieve a just distribution of primary social goods for the most disadvantaged members of society pursuant to the Difference Principle. Rawls points out that “there is a distribution branch. Its task is to preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property.”<sup>231</sup>

It is relatively easy to apply the Difference Principle to deal with redistributive justice issues in property law. Property law regulates the allocation and redistribution of tangible resources, which are likely to be concretizable and monetizable. For example, when a privately owned house is expropriated by the government for the public interest, the resource subject to redistribution is a tangible three-dimensional object in a particular place of the world. In that case, the government needs to pay the owner just compensation for the expropriation of his house.<sup>232</sup> The same applies to the taxation of property as a tool for redistributive purposes. It is relatively easy to ascertain the things subject to taxation and the amount of tax imposed by the state. Therefore, tangible resources protected by property law match comfortably with redistributive justice mandates based on the Difference Principle, which requires the use of resources in favor of the least advantaged.

Unlike real property law, IP law, an area of law that regulates the allocation and distribution of intangible resources such as the expression of ideas and commercial logos protected by copyright and trademark respectively, is not easily compatible with the Rawlsian Difference Principle. The nature of intangible resources fundamentally differs from the nature of tangible resources protected by property law. Intangible resources protected by IP law are not amenable to concretization and monetization. First of all, they may exist in both private spaces (when a person reads a book) and in public spaces (when a writer publishes his book or a

<sup>228</sup> MERGES, *supra* note 22, at 117.

<sup>229</sup> RAWLS, *supra* note 1, at xv (“[I]n a property-owning democracy the aim is to carry out the idea of society as a fair system of cooperation over time among citizens as free and equal persons.”).

<sup>230</sup> *Id.* at 54.

<sup>231</sup> *Id.* at 245. Taxation can be seen as part of a property-based adjustment scheme, because people pay government taxes on the basis of what they own (property tax and income tax). In this sense, taxation acts as a scheme to adjust the extent to which people can own properties.

<sup>232</sup> See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

company advertises their goods identified by their trademarks). Because they exist in public spaces, intangible resources protected by IP law lack the spatial boundaries to be rendered concrete in the way that tangible resources can be. Moreover, they are not easily monetizable since they can be used in a non-excludable and non-rivalrous manner.<sup>233</sup> For example, one's reading of a book does not preclude others from reading it (non-excludability); nor does it diminish others' abilities to read it (non-rivalrous). The potential of being used by numerous people in a variety of ways increases the difficulty of gauging the monetary value of intangible resources, which is necessary in order to promote the public interest through redistributive schemes.<sup>234</sup>

The burgeoning literature on IP and social justice has not previously addressed the issue of the nature of resources subject to the redistributive mandate of the Rawlsian Difference Principle.<sup>235</sup> There are three types of resources that need to be redistributed in the area of IP law: benefits from technological developments, cultural power, and sources of innovation. As shown in Part III, the distribution of these resources is crucial for dealing with the conflict between IP and social justice. First, the distribution of the benefits from technological developments ensures that people can have adequate access to and make sufficient use of technological developments. Second, the distribution of cultural power seeks to promote the ways in which resources with IP protection foster and enhance people's capabilities to participate in the discussion and critique of social issues. Third, the distribution of sources of innovation enables users' engagement with products and services through a wide range of innovative activities that would otherwise be limited due to IP protection of the products and services.

These three redistributive objectives derive from the unique nature of the intangible resources protected by IP law. They align with the public nature of intangible resources protected by IP law; they are not concretizable since they constantly flow in public spaces. They illustrate that intangible resources protected by IP law are inextricably intertwined with the public interest with respect to spreading the benefits from technological developments, exercising cultural power to discuss and critique social issues, and facilitating wide use of sources of innovation. Therefore, these redistributive objectives call for the redesign of IP law in a manner that will better support the public interest.

Moreover, these objectives are commensurate with the fact that the social value of intangible resources protected by IP law is not easily monetizable. We tend not to define the social value of distributing the benefits from technological developments, cultural power, and sources of innovation in terms of their monetary worth. Rather, we consider whether IP protection has facilitated or hampered the realization of one or all of these redistributive goals. Moreover, unlike the redistributive justice measures imposed on property owners that result in depriving them of the ownership control of their properties (e.g. a house demolished for constructing a public school), these three redistributive goals of the IP system do not produce such

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<sup>233</sup> For a discussion about the public goods nature of IP, see WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199-203 (2004); Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 20<sup>TH</sup> CENTURY 308 (Kaul I. Grunberg et al. eds., 1999).

<sup>234</sup> This argument does not apply to the private transactions of IP assets where they are valued with the exact amount of money. This is because these transactions are by nature done for the interests of private parties.

<sup>235</sup> For general discussions on IP and social justice, see INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE (Axel Gosseries et al. eds., 2008); Symposium, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563 (2007).

an outcome. Instead, they allow IP owners to keep ownership control of their IP assets. Since IP assets, as demonstrated above, can be consumed in a non-excludable and non-rivalrous manner, they can be used by IP owners as well as by other people as redistributive justice mandates. The harm caused to IP owners occurs only to the extent that they do not receive economic returns from licensing to those individuals who are the beneficiaries of the redistributive justice mandates. Yet IP owners can still receive royalties from others who are not beneficiaries of the redistributive justice mandates.

The second question arising from the direct application the Difference Principle when dealing with redistributive issues in the IP system pertains to whether or not it is fair to treat the most disadvantaged as the only relevant group of citizens for the purpose of promoting social justice. Rawls suggests several ways of defining the most disadvantaged group.<sup>236</sup> An easy way, as he emphasizes, is to consider an individual's "place in the distribution of income and wealth."<sup>237</sup> This characterization of the most disadvantaged group is "in terms of relative income and [wealth] with no reference to social positions. For example, all persons with less than half the median may be regarded as the least advantaged segment."<sup>238</sup> From this perspective, tens of millions of people with HIV/AIDS in Africa or students from poor families in developing countries without adequate access to textbooks are surely among the most disadvantaged members of society. No doubt, they are too poor to afford goods with IP protection. Therefore, IP policymakers, both at domestic and international levels, should pay special attention to the impact of IP protection on the well-being of these members of society.

However, there are other groups of people who may not be the least well-off, but who still have a high stake in information that is protected by IP law. For example, researchers at biotechnological institutions may face increased difficulties when conducting scientific research due to barriers caused by gene patents.<sup>239</sup> A publisher was enjoined from quoting 300 words from former President Ford's 500-page memoir.<sup>240</sup> Gay Olympic Games organizers were penalized for using the Olympic trademark.<sup>241</sup> All these people are by no means the most disadvantaged members of society in terms of their income. Nor are they the most disadvantaged members in terms of their social positions. They enjoy the same position of equal citizenship as everyone else does. What they are not able to do, in this context, is use others' IP assets without the permission of the IP owners. Since these users are not recognized as members of the worst-off group, the Difference Principle fails to provide them with support to assert their interests in justice-oriented schemes in IP law.

The three kinds of social resources subject to the redistributive objectives needs in IP law have the potential to fill the gap left by the application of the Rawlsian Difference Principle. They require that redistributive justice should not only focus on the least well-off, but should also

<sup>236</sup> RAWLS, *supra* note 1, at 82 ("I suppose, then, that for the most part each person holds two relevant positions: that of equal citizenship and that defined by his place in the distribution of income and wealth.").

<sup>237</sup> *Id.*: see also Philippe Van Parijs, *Difference Principles*, in THE CAMBRIDGE COMPANION TO RAWLS 200, 212 (Samuel Freeman ed., 2003).

<sup>238</sup> RAWLS, *supra* note 1, at 84.

<sup>239</sup> See Lee et al., *supra* note 35, at n.94.

<sup>240</sup> See *Harper & Row Publishers*, 471 U.S. at 569. In this case, the Court held that that The Nation's unauthorized publication of approximately 300 words quoted from the unpublished 500-page manuscript of former President Gerald Ford could not constitute a fair use, even though the quotations were concerned with the Watergate scandal, a historical event of undoubted significance for the public interest.

<sup>241</sup> See *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987).

support others whose interests in using IP protected resources may be unfairly affected by IP law. For example, in the gene patent case, we also need to examine whether the benefits of biotechnological developments and the sources of innovation for these developments have been distributed in a way that benefits appropriate researchers. In the news reporting and Gay Olympic Games cases, we need to examine whether cultural power has been fairly distributed to different members of our society. These inquiries support a premise: while IP owners receive benefits from IP protection, both the worst-off group of people and also other groups of people should enjoy the distributions of benefits of technological developments, cultural power, and sources of innovation. IP ownership should not prevent a fair distribution of these resources.

However, this does not necessarily mean that the Rawlsian Difference Principle has no utility in promoting justice in the IP system. When it is applied to the distribution of intangible resources in the IP system, we must recognize that the principle has limitations and needs to be modified to align with the three redistributive justice objectives. Yet the principle remains critically important to the most disadvantaged members of society. They have extremely limited power to influence the political process, which could be skewed by copyright-based conglomerates. From this perspective, the principle lends very strong moral support for distributing intangible resources in a just way in order to benefit the most disadvantaged.

## 2. The Utilitarian Justification for IP

The second substantive value of the *shanzhai* phenomenon stems from its repudiation of the incentive-based justification for expansive IP protection, which has achieved a dominant position in IP theory.<sup>242</sup> Commentators contend that IP is necessary because it provides authors, innovators, and traders with the incentives to create.<sup>243</sup> While the initial process of creation can be arduous and costly, copying is easy and cheap. This stark contrast makes it likely that copiers can easily free-ride on efforts of the creator. Gradually or overnight, creators may lose their competitiveness in the marketplace if copiers can distribute cheaper products or services. This vulnerability to free-riding activities may deter risk-averse creators from investing in creative work. IP protection gives creators a set of exclusive rights to use their creations, and copiers are penalized if they use IP without the owner's consent.<sup>244</sup> Hence, IP provides assurance to creators that their efforts will be protected against unauthorized uses and that they will recoup investments if commercial exploitation of their creations occurs, thus providing an incentive for creative work.<sup>245</sup>

The three redistributive justice mandates gleaned from the *shanzhai* phenomenon, however, reveal that the incentive-based justification for stringent IP protection has two serious

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<sup>242</sup> See Sunder, *supra* note 27, at 259 (arguing that “in the United States intellectual property is understood almost exclusively as being about *incentives*”).

<sup>243</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY* LAW 8 (2003).

<sup>244</sup> However, copiers would not be penalized if unauthorized uses of IP were protected by the limitations on IP rights. For example, fair use as a limitation on copyright allows the public to make limited uses of copyrighted works without their owners' consents.

<sup>245</sup> See LANDES & POSNER, *supra* note 243, at 40 (“In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying, with the result that the work may not be produced in the first place because the author and publisher may not be able to recover their costs of creating it.”).

limitations. First, the *shanzhai* phenomenon shows that IP-backed incentives may not be essential for innovative endeavors to realize business success and generate social benefits. Even though many *shanzhai* companies copy products made by luxury brands, they actually have little impact on the market share of luxury companies. Rather, the luxury market, as Part I showed, achieved an unprecedented rapid growth in China at the same time that the *shanzhai* phenomenon grew from its infancy to nation-wide popularity. For example, there have been at least six *shanzhai* versions of the Apple iPhone,<sup>246</sup> but Apple has never bothered to enforce its IP rights against these *shanzhai* phones in the market. It is clear that Apple understands that its efforts to lead innovation in product developments will secure its continued success in the market. From this perspective, Apple should not divert resources to enforce its IP rights in the Chinese market. Rather, it should concentrate on how to offer more innovative products and to implement more creative marketing strategies in China. To date, that strategy has worked very well for Apple in the Mainland China market.<sup>247</sup>

Second, the *shanzhai* phenomenon raises the question of whether the incentive-based theory embodies an adequate vision for accommodating and promoting social justice.<sup>248</sup> The incentive-based theory lends strong support to the argument that whenever an unauthorized use of IP would cause economic harm to an IP owner, IP law should be invoked to penalize the user.<sup>249</sup> It assumes that an IP owner, as the creator of the protected resource, necessarily knows how to use his or her IP in an efficient way. The more IP owners receive protection from the law, the more IP assets will be created. In aggregate, penalizing unauthorized uses of IP assets, therefore, would lead to increased efforts to create assets that can receive IP protection.<sup>250</sup>

This argument ignores the issue that strong protection of IP owners' interests does not necessarily promote social justice in achieving a fair distribution of resources. Instead, such protection condones and facilitates an unfair distribution of resources. Put differently, the incentive theory is intended to make the "pie" of IP assets as big as possible, but it does not address whether the distribution of the "pie" is just or not.

The recent expansion of IP protection has been skewed, distributing resources to IP right holders in the name of providing adequate incentives for investment. The tension between strong protection of IP rights and the distribution of the benefits from technological developments, cultural power, and sources of innovation demonstrates that those expansions have been accomplished at the expense of the public interest at large.

To be sure, justice and moderate redistribution of resources in IP law is not intended to

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<sup>246</sup> See Bergman, *supra* note 9, at slide 1.

<sup>247</sup> *Why Apple Attention to the China Market*, TABLET PC BLOG (May 11, 2011), <http://www.ipad32g.com/why-apple-attention-to-the-china-market.html> (noting that for "2010 fiscal year, sales of Apple products in China, up 249% growth in total revenue of 30 billion U.S. dollars").

<sup>248</sup> Sunder, *supra* note 27, at 259 ("Intellectual property utilitarianism does not ask who makes the goods or whether the goods are fairly distributed to all who need them.").

<sup>249</sup> Legal penalties are seen as an effective way of increasing the cost of copying. Thus, they would deter copiers from making unauthorized uses of IP. See LANDES & POSNER, *supra* note 243, at 51 ("The higher the cost of a copy relative to that of the original, the smaller is the advantage to the copier from not having borne any part of the cost of creating the original.").

<sup>250</sup> See, e.g., *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005), *aff'd* on this point, *vacated* on other grounds, 489 F.3d 474, 480 (2d Cir. 2007) ("Copyright and trademark are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole.").



suppress or sabotage the market position of IP owners. The coexistence of the *shanzhai* phenomenon and the luxury market in China illustrates this point. Their coexistence shows that we can use IP as a tool to promote social justice. It may slightly harm the interests of IP owners, but the harm need not reach a level that prevents IP owners from creating and marketing their products.

### 3. Further IP Reforms

The social justice theory of IP law, as discussed earlier, focuses on whether IP law promotes the redistribution of three kinds of social resources. From this perspective, redistributive needs become the benchmark against which we can consider whether IP law should be reformed in order to promote social justice. The frequent uses of copyrighted works and trademarks by the *shanzhai* movement should prompt Chinese legislators to clarify the scope of both copyright and trademark fair use doctrines.<sup>251</sup> For example, Chinese IP law does not clearly specify whether use of a copyrighted work or trademark to make parodies and to circumvent technological measures for software compatibility purposes and jailbreaking smartphones<sup>252</sup> falls within the scope of the fair use doctrine.

As discussed in Parts I and II, there are many parodies among *shanzhai* cultural activities. For example, they make fun of Chinese or Hollywood blockbuster films that are protected by copyright law. The problem for parody makers is that parody is not statutorily recognized as a fair use of a copyrighted work. Article 22(1) of the Chinese Copyright Law<sup>253</sup> lists twelve categories of fair uses that give the public the right to limited uses of copyrighted works without permission from copyright holders. These exceptions include fair uses for news reporting, teaching, or research.<sup>254</sup> The list of permissible fair uses set out in Article 22 is said to be exhaustive.<sup>255</sup> Many scholars in China hold the view that fair use exceptions make inroads into

<sup>251</sup> Taylor, *supra* note 112 (quoting an interviewee who asserted that “[i]n China, the concept of parody as a defence in trademark infringement claims has yet to be recognized expressly in its trademark legislation”).

<sup>252</sup> However, the practice of jailbreaking, as Apple claimed, would amount to an infringement of their copyrights. The DMCA contains an anti-circumvention provision that prohibits the act of circumventing a technological protection measure utilized by a copyright holder to control access to a copyrighted work. In July 2010, the Copyright Office, however, lifted the cloud of uncertainty concerning the iPhone and announced that jailbreaking the mobile device was not a DMCA violation:

[W]hen one jailbreaks a smartphone in order to make the operating system on that phone interoperable with an independently created application that has not been approved by the maker of the smartphone or the maker of its operating system, the modifications that are made purely for the purpose of such interoperability are fair uses.

LIBRARY OF CONGRESS & COPYRIGHT OFFICE, EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES, *available at* [https://www.eff.org/files/filenode/dmca\\_2009/RM-2008-8.pdf](https://www.eff.org/files/filenode/dmca_2009/RM-2008-8.pdf). *See also* Fred von Lohmann, *Apple Says iPhone Jailbreaking is Illegal*, ELECTRONIC FRONTIER FOUNDATION (Feb. 12, 2009), <http://www.eff.org/deeplinks/2009/02/apple-says-jailbreaking-illegal>.

<sup>253</sup> Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990).

<sup>254</sup> *Id.*

<sup>255</sup> *See, e.g.,* XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21<sup>ST</sup> CENTURY 92 (2002) (“Since fair uses are serious limitations imposed on the exclusive rights of copyright owners, they should be clearly defined and stipulated . . . . [T]he list under Article 22(1) of the Copyright Law is inclusive, not illustrative. Courts, when deciding cases, have no power to create new type of fair use beyond the scope of the provision . . . .”).

the copyright holder's market.<sup>256</sup> As such, permitted fair use practices should be clearly limited.<sup>257</sup> Hence, the list of permissible fair uses in Article 22(1) should not be considered nebulous and illustrative, and should be considered to be exhaustive. If a use does not fit into the scope of any of the exceptions, it should not be deemed fair use.

Parody is not listed as a statutory fair use defense against an allegation of copyright infringement in Chinese copyright law. Further, unlike in the United States, where a series of judicial decisions have recognized parody as a paradigmatic fair use of copyrighted materials,<sup>258</sup> there is no case law on parody and fair use in China. Thus, whether parody is fair use is a gray area in Chinese copyright law. This may have chilling effects on the enjoyment of the free speech right because it makes it very difficult for the public to know in advance whether or not they are allowed to use a copyrighted work for making a parody.

Although a parody draws on a copyrighted work, it is by nature a "cultural practice which provides a relatively polemical allusive imitation of another cultural production or practice."<sup>259</sup> While a parody provides fun for its maker and audience, it has power to encourage people to participate in discussion of a wide range of issues concerning society at large. Therefore, it promotes cultural exchange in a society. In particular, parody is an important vehicle for people to convey their critiques of cultural phenomena. From this perspective, recognizing parody as a fair use meets the need to promote the distribution of cultural power among different groups of people.

The phenomenon that has fostered the creation of *shanzhai* parodic works demonstrates the necessity of recognizing parody as fair use in Chinese Copyright Law. Alternatively, there may be a need to have a paradigmatic change to the fair use system in China, making it an open-ended system as in the United States. Otherwise, the omission of parody as an expressly recognized fair use will continue to undermine the enjoyment of the free speech right in China.<sup>260</sup>

In fact, China is not alone in having no explicit statutory or judicial recognition of parody as a fair use. In Canada, for example, parody is not accepted as a defense that exempts a user of copyrighted work from liability for copyright infringement. In *Canwest v. Horizon*,<sup>261</sup> the publisher of the *Vancouver Sun* filed a lawsuit against the defendant's publication of a pro-Palestinian parody of the paper. The court ruled that parody is not a defense against the allegation of copyright infringement.<sup>262</sup> Parody has also not been accepted as a defense in the United Kingdom. Despite a call to create a fair dealing limitation on copyright that accommodates

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<sup>256</sup> See, e.g., *id.*

<sup>257</sup> *Id.*

<sup>258</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that a "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one"); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001) ("A parody is a work that seeks to comment upon or criticize another work by appropriating elements of the original."); *Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 807 (2003) (holding that "First Amendment concerns in free expression are particularly present in the realm of [parodies as] artistic works").

<sup>259</sup> SIMON DENTITH, *PARODY* 9 (2000).

<sup>260</sup> See, e.g., Michael Wines, *Scatological Mockery of Chinese Official Brings Swift Penalty*, N.Y. TIMES (June 8, 2011), [http://www.nytimes.com/2011/06/09/world/asia/09parody.html?\\_r=1&ref=global-home](http://www.nytimes.com/2011/06/09/world/asia/09parody.html?_r=1&ref=global-home).

<sup>261</sup> *Canwest v. Horizon*, [2008] B.C.S.C. 1609 (Can.); see also Emir Aly Crowne Mohammed, *Parody As Fair Dealing In Canada: A Guide for Lawyers and Judges*, 4 J. INTELL. PROP. L. & PRAC. 468 (2009).

<sup>262</sup> *Canwest v. Horizon*, [2008] B.C.S.C. 1609, ¶ 7 (Can.).

parody,<sup>263</sup> the UK Intellectual Property Office stated, “the advantages of a new parody exception were [not] sufficient to override the disadvantages to the creators and owners of the underlying work. Thus, there is no proposal to change the current approach to parody, caricature and pastiche in the UK.”<sup>264</sup>

### B. The Symbolic Value

The needs to distribute the three kinds of resources also bear strong symbolic value in promoting social movements for achieving justice. First, they have the symbolic value to mobilize social movements that fight for justice in a hostile political environment. The recent pro-justice campaigns to expand the availability of patented drugs and to promote access to knowledge took place in a relatively liberal environment. Civic activists, academics, and journalists all voiced concerns about the negative role of IP protection in causing social injustice.<sup>265</sup>

As shown in Part III, the *shanzhai* phenomenon has signaled the urgent need to organize a civil rights movement in China to combat inequality. In China, public discussion about the cause of massive nation-wide food insecurity became a sensitive political issue subject to speech control.<sup>266</sup> The *shanzhai* phenomenon, however, has broken through speech surveillance and control by the Chinese government. It has engaged so many people and made such wide use of new social media that the government has been unable to carry out effective measures to censor *shanzhai*-related speech activities. This success derived from mobilizing people at the grassroots level including university students, migrant workers, and the unemployed. Moreover, the *shanzhai* phenomenon hugely benefited from the emergence of new social media such as online forums, blogs, and video sharing websites, which have engaged people in discussions about social issues. One commentator insightfully pointed out “the *shanzhai* characteristics of parody, anarchy and ridicule – all of which arise from the displacements of exile, *with* an ironic media and *against* the official declarations of social harmonization.”<sup>267</sup> In many cases, a *shanzhai* product or activity quickly became very popular shortly after being reported on the Internet. Some copying acts of the *shanzhai* phenomenon, have violated Chinese IP law, but violating law has become an inevitable means of promoting social justice in China.<sup>268</sup> It signals to the public that “imitation is

<sup>263</sup> See HM TREASURY, GOWERS REVIEW OF INTELLECTUAL PROPERTY 6 (2006), available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (recommending that the UK should “[c]reate an exception to copyright for the purpose of caricature, parody or pastiche by 2008”).

<sup>264</sup> UK INTEL. PROP. OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: SECOND STAGE CONSULTATION ON COPYRIGHT EXCEPTIONS (2009), available at <http://www.ipo.gov.uk/consult-gowers2.pdf>.

<sup>265</sup> Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804, 820-59 (2008).

<sup>266</sup> See, e.g., Sharon LaFraniere, *In China, Fear of Fake Eggs and ‘Recycled’ Buns*, N.Y. TIMES, May 8, 2011, at N1 (“China’s iron political controls ensure that no powerful consumer lobby exists to agitate for reform, press lawsuits that punish wayward producers or lobby the government to pay as much attention to consumer safety as it does to controlling threats to its own power. Instead, like Alice after falling through the rabbit hole, consumers must guess what their food and drink contain.”).

<sup>267</sup> Donald, *supra* note 30, at 5-6 (emphasis added).

<sup>268</sup> See, e.g., EDUARDO M. PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 11 (2010) (forcefully demonstrating that “the apparent stability and order provided by property law owes much to the destabilizing role of the lawbreaker in occasionally forcing

the sincerest form of rebellion in China.”<sup>269</sup> This symbolic value of the *shanzhai* phenomenon lies in its power to signal the need for civil disobedience to the economically poor, the politically marginalized, and the culturally weak.

Thus, the *shanzhai* phenomenon has conveyed Martin Luther King’s “I have a dream” message to the Chinese public. The message calls for the Chinese public to rise up and fight for social justice. The power wielded by the *shanzhai* phenomenon may have sown the seeds of a groundbreaking civil rights movement, pressuring the government to reform and to consider the interests of the poor more seriously.

In addition to creating new ways to fight for justice, the *shanzhai* phenomenon also expands the breadth of pro-justice social movements by channeling broader issues that have become problematic in society. First, the *shanzhai* phenomenon criticizes consumerism that is socially harmful. It presents a radical critique of the prevalence of luxury products among the rich in China by revealing to the public a host of social problems behind it. The corruption underlying the luxury market is very serious. The majority of purchased luxury goods are given between men as gifts in business transactions to create social networks. Often these actions are bribes of governmental officials or officials working in state-owned companies.<sup>270</sup> The *shanzhai* phenomenon also critiques strong conspicuous consumerism<sup>271</sup> among the rich in China who have not paid due regard to their social responsibilities. Rich Chinese consumers are now famous for their lavish spending habits. Sadly, luxury products are now commonly designed to cater to the needs of conspicuous spending behaviors, with their glamorous brands strongly protected by IP law. Luxury is simply a product packaged and sold by multibillion-dollar global corporations focused on growth, visibility, brand awareness, advertising, and, above all, profit.<sup>272</sup>

By using IP assets and even violating IP law, the *shanzhai* phenomenon raises the question of why strong IP protection should be provided for a luxury industry that facilitates corruption and conspicuous consumerism, both of which are characteristics of the rich who disregard their social responsibilities. Silent changes have taken place in China. For example, the HiPhone, a typical *shanzhai* cell phone, has been hailed as “the poor man’s iPhone,”<sup>273</sup> which ostensibly ridicules the high-priced iPhone. An “interesting change of attitudes in youth (in big cities like Shanghai and Beijing)” is reported to be “the diversified meaning of ‘status’; while big brands may embody a ‘status’ in conventional way, *shanzhai* phones may imply a ‘status’ of rebellion.”<sup>274</sup>

Additionally, the *shanzhai* phenomenon shows the stark landscape of a wide range of

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needed reform and in generating a series of important legal shifts along the way”).

<sup>269</sup> Canaves & Ye, *supra* note 13.

<sup>270</sup> See Tom Orlik, *Luxury China’s Nouveau Risk*, WALL ST. J. (Nov. 1, 2011), <http://online.wsj.com/article/SB10001424052970204528204577008783087097026.html> (“With expensive gifts a routine channel for corruption, the luxury sector owes a part of its explosive growth to the dark side of China’s rise.”).

<sup>271</sup> See, e.g., ROBERT FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 159–65 (1999) (portraying much consumer purchasing as an arms race, in which each new purchase spurs others to engage in similar purchasing, but with no gain in status since status is inherently relational); JULIET SCHOR, *THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON’T NEED* (1999).

<sup>272</sup> See, e.g., DANA THOMAS, *DELUXE: HOW LUXURY LOST ITS LUSTER* (2008).

<sup>273</sup> Taylor, *supra* note 112 (“One online commentator has translated the expression as *poor man*’s: the popular HiPhone, which is probably the most hi-tech and convincing copy of Apple’s iPhone and is freely available in mainland China and online, could be regarded as the poor man’s iPhone.”).

<sup>274</sup> Donald, *supra* note 30, at 5.

inequality problems that have become enormous in Chinese society. The glamour of luxury stores hides these problems, but *shanzhai* brings them to the forefront of public discourse on social reforms. China underwent a rapid economic reform in the past thirty years, shifting from a state-planned economy to a free market-based system.<sup>275</sup> Its rapid economic growth brought a host of social problems in almost all sectors of society.<sup>276</sup> The Gini coefficient, widely recognized as a yardstick to measure inequality of distribution of wealth, has increased by about 50%, from around thirty to forty-five over the past twenty-five years.<sup>277</sup> A World Bank report bluntly summarizes the situation:

Not everyone has participated in the economic success equally. Income inequality in China has increased significantly since the start of economic reforms, and China is no longer the low-inequality country it was a quarter century ago . . . . Where China stands out is in the magnitude of the increase in inequality and the pace at which it has occurred. The rise in inequality is the result of both a widening income gap between the cities and the countryside, as well as growing inequality within rural and urban areas.<sup>278</sup>

The *shanzhai* phenomenon reveals the harsh realities of massive inequality in China. To some extent, it runs directly counter to a strategy that has been long used by the Chinese government, which prioritizes economic growth as the top concern of social development. As the Chinese government has publicized this strategy of economic growth through major media outlets in China, it has indoctrinated people with the ideology of economic growth.<sup>279</sup> Making money to pursue economic well-being has become like a religion for millions of people in China. The growth of the luxury market fits perfectly with this strategy. As people become richer, luxury products present them with the maximum rewards for religiously chasing money. By contrast, the *shanzhai* phenomenon reveals that the ideology of economic growth has worsened social inequality and does not do justice to the interests of the poor. It informs the public of worsening social ills and calls for the government to reform its main strategy of development.<sup>280</sup>

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<sup>275</sup> See, e.g., YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE (2008).

<sup>276</sup> See, e.g., MARTIN KING WHYTE, MYTH OF THE SOCIAL VOLCANO: PERCEPTIONS OF INEQUALITY AND DISTRIBUTIVE INJUSTICE IN CONTEMPORARY CHINA (2010).

<sup>277</sup> XUBEI LUO & NONG ZHU, RISING INCOME INEQUALITY IN CHINA: A RACE TO THE TOP 3 (2008), available at [http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2008/08/25/000158349\\_20080825160141/Rendered/PDF/WPS4700.pdf](http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2008/08/25/000158349_20080825160141/Rendered/PDF/WPS4700.pdf).

<sup>278</sup> WORLD BANK, FROM POOR AREAS TO POOR PEOPLE: CHINA'S EVOLVING POVERTY REDUCTION AGENDA vii (2009), available at [http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2009/04/08/000334955\\_20090408062432/Rendered/PDF/473490SR0CN0P010Disclosed0041061091.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2009/04/08/000334955_20090408062432/Rendered/PDF/473490SR0CN0P010Disclosed0041061091.pdf).

<sup>279</sup> See Heike Holbig & Bruce Gilley, *Reclaiming Legitimacy in China*, 38 POL. & POL'Y 395, 396 (2010) ("In popular and even many academic discussions, the reasons for regime legitimacy in China are reduced to two main factors: economic growth and nationalism.").

<sup>280</sup> See Michael Wines, *China Unveils Economic Plan With Focus on Raising Incomes and Reining in Pollution*, N.Y. TIMES, Mar. 4, 2011, at A9.

## V. CONCLUSION

Although social justice is a value central to humanity and civilization, we live in an unequal society polarized by the unfair distribution of resources. People still live in poverty and even die from the lack of food. Other people, however, are rich enough to shop happily in luxury stores without regard for those who die of hunger. This stark contrast questions whether we are civilized enough to call ourselves human beings or instead lack the ability to sense the pain of our peers.

Forty years ago John Rawls's groundbreaking book, *A Theory of Justice*, radically transformed our vision of justice. Yet social inequality has continued to worsen in our society.<sup>281</sup> Individuals who possess great resources have done little to fulfill their social responsibility to curb injustice. When a Danish artist used the legendary Louis Vuitton monograms as part of her artwork to call for global attention to the war in Darfur, Louis Vuitton moved to stop this benign action in the name of protecting its intellectual property.<sup>282</sup>

Confronted with these harsh realities, we must act in concert to fight for justice and equality. In contrast to China's large and growing luxury market, the *shanzhai* phenomenon has championed the cause of social justice, embodying a common pursuit for dignity and humanity in civilized society. From this perspective, the *shanzhai* phenomenon, as one commentator has described, might "translate best as Robin Hood culture meets British satire *Little Britain* or, to cross a few borders, the Australian political outlaws in *The Chaser's War on Everything* meets Tina Fey's Sarah Palin from the 2008 United States election campaign."<sup>283</sup> It encourages IP law to be redesigned to support the redistribution of three kinds of resources: benefits from technological development, cultural power, and sources of innovation.

The goal of promoting the agenda of social justice in our society cannot come to fruition without civil movements powered by *shanzhai*-type cultural phenomena. A government will not take seriously a politically dormant mass sleeping quietly underneath a dead volcano. Only by exposing the government to an erupting active volcano can citizens force those in power to act for social justice.<sup>284</sup>

<sup>281</sup> As of 2007, the top 10% of citizens earned 49.7% of total income in the United States. That percentage is higher than the comparable percentage at any point during the twentieth century. Emmanuel Saez, *Striking It Richer: The Evolution Of Top Incomes in The United States*, PATHWAYS MAG., Aug. 5, 2009, at 5, available at <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2007>.

<sup>282</sup> Ernesto, *Louis Vuitton Sues Darfur Fundraiser for Copyright Infringement*, TORRENTFREAK (Apr. 25, 2008), <http://torrentfreak.com/louis-vuitton-sues-darfur-fundraiser-for-copyright-infringement-080425/>; Sheila Marikar, *Louis Vuitton on Artist's Darfur Project: Bag It*, ABC NEWS (May 14, 2008), <http://abcnews.go.com/Entertainment/BeautySecrets/story?id=4839919&page=1>.

<sup>283</sup> Donald, *supra* note 30, at 6; see also Taylor, *supra* note 112 ("In rural areas, *shanzhai* pop concerts featuring lookalike singing stars have become popular, providing a low-cost alternative for poorer members of society. The people who produce these goods or events are regarded by some as working-class heroes, similar to Robin Hood in western culture.").

<sup>284</sup> See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 54-88 (1985) (arguing that it was Jews' lack of active political participation and obsession with their own private lives that led to the massacre of Jewish people in Germany).